Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 296.

CHARLES D. NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK, AND ALFRED M. BARRETT, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT,

Appellants,

against

NEW YORK AND QUEENS GAS COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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INDEX.

LIST OF CASES AND STATUTES CITED.

Supreme Court of the United States,

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No. 296.

CHARLES D. NEWTON, as Attorney-General of the State of New York, and ALFRED M. BARRETT, constituting the Public Service Commission of the State of New York for the First District,

Appellants,

AGAINST

NEW YORK AND QUEENS GAS COMPANY,

Appellee.

BRIEF FOR APPELLEE.

This appeal by the defendants below is from a final decree which enjoined as confiscatory the further enforcement of a statutory rate of One Dollar ($1.00) per thousand cubic feet, for gas sold by the appellee in the Third Ward of the Borough of Queens, City of New York.

The decree appealed from was entered in the United States District Court for the Southern Dis-

trict of New York, on November 19, 1920, upon the direction of the Honorable Julius M. Mayer, District Judge, before whom the case came for hearing, after the testimony had been taken before a Special Master.

The One Dollar ($1.00) rate enjoined was prescribed by Chapter 125 of the Laws of 1906, to be effective in that portion of the City of New York after the year 1910.

The proofs submitted in this case covered the years 1918, 1919 and the first five months of 1920.

The final decree of November 19, 1920, held the One Dollar rate confiscatory and void as to the appellee, and enjoined the appellant public authorities from seeking to enforce the statutory rate or the penalties prescribed for violation of it.

Statement.

The suit was started April 7, 1919, and was referred to a Special Master on May 19, 1919 (page 25). By reason of the fact that counsel on both sides were continuously engaged in the trial before the same Special Master of the case of the *Consolidated Gas Company* involving the rate fixed by the same statute for the Boroughs of Manhattan and The Bronx, the trial of this suit before the Special Master was not begun until after the close of the *Consolidated Gas Company* case in the spring of 1920. The Special Master's report was filed July 16, 1920, and the final decree was entered on November 19, 1920.

The Property of the Appellee.

The appellee supplies gas to the inhabitants of what is now the third ward of the Borough of Queens in the City of Greater New York, formerly the Town of Flushing, County of Queens. It owns a plant for the manufacture of water gas in the former village of Flushing, having a working capacity of 2,250,000 cubic feet of gas per day. It owns and uses more than 130 miles of gas mains in this sparsely settled territory, through which it furnishes gas to approximately 11,000 consumers (finding No. 6, pages 34 and 35). In 1919 its total sales were approximately 336,000,000 cubic feet of gas.

The Report of the Special Master.

The Special Master made detailed findings (record, pages 32 *et seq.*) as to the various facts proved before him, and also filed a separate opinion stating the reasons for his decision (page 46). Evidence as to the cost of making gas was presented for the years 1918, 1919, and for five months of 1920, and the findings separately state the manufacturing cost for those periods. The principal findings of the Master may be briefly summarized as follows (pages 38-40):

Cost of manufacture per thousand cubic feet made	$.6345
Cost of manufacture per thousand cubic feet sold	.7173
Cost of distribution	.2700
Taxes	.0707
Renewals and replacements	.0300
Total cost	1.0880
Miscellaneous operating revenue	.0675
Net cost of gas delivered to consumer	$1.0205

The Master based his findings upon the operations for the year 1919, stating that the cost of gas in the year 1920, when the statistics were completed, would be in excess of the figure for 1919 (page 48). For example, the Master found that, as of the time of the close of the hearings in June, 1920, the cost of manufacture was 84.27 cents per thousand cubic feet of gas sold (Record, pages 39-40), as contrasted with 71.73 cents per thousand for 1919. The difference between the cost per thousand cubic feet made and the cost per thousand cubic feet sold is due to the so-called "unaccounted for gas", found in this case to be 11.03% of the gas manufactured (finding 23, page 39).

The average selling price of gas, including that sold to the City of New York at 75 cents per thousand cubic feet, was found to be 99.51 cents in 1919, leaving a net deficit to the complainant company below operating expenses in 1919 of 2.54 cents per thousand cubic feet, irrespective of any return upon any of the property used in its gas operations (finding 31, page 41).

The Master's Findings as to the Value of the Property used by the Appellee.

Following the ruling made by him in the *Consolidated Gas Company* case, the Special Master limited his finding of the value of the property of the complainant used by it in the gas business, upon which it was entitled to earn a fair return, to a minimum *actual investment* of the company in the property. The company was incorporated in July, 1904 (page 33), and acquired as of August 1, 1904, the property of the Newtown and Flushing

Gas Company, which had been prior to that date furnishing gas to the inhabitants of this territory (finding No. 2, page 33).

The Special Master found the company's total investment as of January 1, 1920, to be as follows:

Property acquired in 1904 and still in use.....	$670,488.86
Net additions between August 1, 1904, and Jan. 1, 1920.....	850,389.08
Working capital	135,000.00
Total.....	$1,655,877.94

(finding 34, page 41). No sum was deducted by the Master for accrued "theoretical depreciation" for reasons stated in his opinion (pages 41 and 57 *et seq.*). The Master further found upon evidence that the sum of $5 per thousand cubic feet of annual sales fairly represents the actual and necessary investment in property used and needed for manufacture, transmission and distribution of gas under the conditions under which the complainant operates (finding 35, page 41).

The fair and reasonable present market value of the land unimproved, included in the foregoing amount as of January 1, 1920, was at least $45,153.90 (finding 39, page 42).

The Master felt it unnecessary to make detailed findings of the complete present reproduction cost of the complainant's property (page 57) but at the request of the complainant he did make a finding *upon undisputed evidence* of the actual present cost as of January 1, 1920, to reproduce the plant, distributing system and other tangible property of

the company exclusive of working capital and undistributable structural costs. This he found to be $2,100,774.90 (finding No. 40, page 42). He also found that, to the foregoing sum there should be added amounts to cover organization and development expenses prior to construction, cost of financing, interest during construction, taxes during construction, engineering, superintendence and general contractors expense and profit, administrative, legal and miscellaneous expenses during construction and going value. He did not, however, make definite finding as to the amounts to be added for these items.

He further found (finding 42, page 43) that using unit prices of labor and materials prevailing January 1, 1914, the cost to reproduce the tangible property would be about one-half the above stated cost to reproduce as of January 1, 1920.

He found that the reasonable and proper rate of return upon the capital investment in the gas business of the company was not less than 8% per annum, amounting to $132,407.24, calculated upon the investment of the company as found by the Master (finding 45, page 44).

During the year 1919 the actual net deficit in operating expenses in the gas business of the company was $9,074.70, and the deficit below a reasonable return upon the complainant's investment, as found by the Master, amounted to $141,544.94 (finding 48, page 44).

The Final Decree.

In reviewing the report of the Special Master, ie District Judge made the following modifica- ons in operating costs:

1. He reduced the percentage of unaccounted for gas from 11.03% to 10% (page 111), thereby decreasing the cost of manufacture of gas per thousand cubic feet sold by .83 cents.

2. He eliminated the item "interest on unpaid taxes" (page 111).

3. He added to the income the amount of dividends received from investments in an insurance participation fund (page 112).

4. He increased the income from sales of all gas from the amount actually received of 99.51 cents per thousand cubic feet to $1.00 per thousand.

The result of these eliminations was a net cost production and distribution of $1.0129 per thou- nd cubic feet as against the Master's $1.0205 page 111), and as against an actual net cost of .0705 per thousand cubic feet. In view of the ct that the cost of production and distribution as in excess of the rate prescribed by the stat- e, thus showing an actual deficit in operating penses regardless of any return upon any amount investment, the court, while refraining from pressing any opinion upon the various conten- ons as to the rate base or the proper method valuing the property of the appellee, found at the actual cost of the tangible property of e complainant company, *concerning which there as no controversy on the part of the defendants*, as $1,130,497.08, which sum the Court found as

the *absolute minimum* of actual investment (page 115). The Court said:

> "If it were necessary to find the reproduction value the figure would be much greater. It is, however, sufficient, for the purpose of this case, that the court shall find said sum of $1,130,497.08 as the smallest amount upon which a return should be figured. All other findings touching the rate base have become immaterial to this case. At any rate of return from 8% down to 6%, the statutory rate of $1 is confiscatory on the evidence in this case."

The Principal Facts are Undisputed.

In spite of the long record made, the evidence presents no issue of *fact* upon any matter material to the decision of the case. No witness on behalf of the appellants contradicted any fact testified to by any witness of the appellee. The few disagreements presented by the testimony concern matters of *opinion:* for the most part they relate to the rule of law to be followed or as to the amount to be allowed in instances where the necessity of some allowance was admitted. We call attention at this point to the absence of controversy on some of these principal facts:

a. Inventory and reproduction cost.

The appellee introduced a detailed inventory of property in use by the appellee as of December 31, 1919, together with a detailed estimate of the cost of reproduction as of that date. This inventory and the notes accompanying it are printed as constituting a part of the testimony of the witness Miller beginning at page 559 of the printed record. This inventory, as well as other tabulated exhibits sub-

mitted by the appellee, was submitted to the appellants at least six months prior to the trial of the action and was by them carefully checked and the various items therein actually examined at the plant. This inventory showed a total cost to reproduce as of January 1, 1920, of $2,907,062, including working capital but exclusive of going value which the same witness testified would be at least $525,000 to $550,000 additional (page 814). The Special Master found the reproduction cost of the *tangible* property, exclusive of undistributed structural costs and of going value, would be at least $2,099,621, or nearly twice the actual cost of the property to the company, and more than twice if the other elements of value were added (page 57). The correctness of the items of this inventory and of the cost to reproduce was not disputed by the appellants.

b. The original cost.

Likewise as to the original cost of the property the complainant prepared an exhibit showing the date of acquisition and original cost so far as ascertainable of the items in exhibit 66 (exhibit 96, page 1605 *et seq.*). As the complainant company acquired its property on August 1, 1904, prior to which date records of original cost are not available, both parties agreed in assigning to the property acquired on that date and still in use on December 31, 1919, as representative of original cost and reasonable value as of August 1, 1904, the sum of $280,108 (Master's opinion, page 54; testimony of defendants' witness Hine, page 1178). Since August 1, 1904, net additions to tangible property cost $850,389.08, and as to this figure both parties are likewise in accord. These two figures make up

the amount of $1,130,497.08 found by the court as the "absolute minimum of actual investment" (page 115). Thus the actual cost to the appellee of the tangible property used by it in the gas business is agreed to by both parties.

c. As to the *quantity* of property actually and necessarily used by the company in the conduct of its gas business, there was likewise no dispute. All of the property of the company is actively in use as will be seen by reference to the map and photographs thereof contained in the record (pages 1480 *et seq.*).

d. The appellants admitted that the plant of the complainant company was well maintained in excellent operating condition (page 1181).

e. The appellants did not seek to controvert, by any witness called in their behalf to testify, the reasonableness of the cost of the principal materials such as coal, oil, cast iron pipe, etc., used in the manufacture and distribution of gas by the complainant, as shown by its records, vouchers and books of account introduced in evidence.

f. No one on behalf of the appellants testified that any item in the company's expenditures was extravagant, wasteful or unnecessary.

g. No one testified on behalf of the appellants that gas could be made in a plant such as the company's with the use of less coal, oil, labor, etc., than is actually being used as shown by the complainant's books and records, or with less than should be used under average conditions according

to the testimony of the appellee's expert (see complainant's exhibit 77, page 1596).

h. No one testified that the percentage of gas lost or unaccounted for shown by the company's record was too high or that any other company similarly situated can do better (the Special Master took the actual percentage of unaccounted-for for 1919 of 11.03% while the court accepted the testimony of the complainant's expert that 10% would be a reasonable amount of unaccounted-for gas).

i. No one testified in contradiction to the testimony of appellee's witness (page 880, *et seq.*) that the proper rate of return upon the investment in the gas property of the appellee should be not less than 8% per annum.

j. The defendants did not offer any controversy or question that the appellee owns, exercises and enjoys franchises and rights to maintain its pipes and conductors and to furnish gas through the streets, alleys and public places in the Third Ward of the Borough of Queens.

I.

The appellee's proof as to the cost of manufacturing and distributing gas, and the confiscatory effect of the operation of the statutory rate of one dollar per thousand cubic feet of gas, has not been controverted by the defendants.

(1) *The Defendants' Evidence.*

The appellants (defendants below) persist throughout their briefs in a contention that the appellee (complainant below) failed upon the trial to prove its operating expenses in the production and distribution of gas, the use of materials and the employment of labor in such production and distribution, the quantity of gas produced and distributed, and the quantity of gas delivered (*e. g.*, Brief of Appellant Wallace, pages 11-12).

If all the evidence presented in behalf of the complainant through various officers, employes and others not directly connected with the company, including the books of account, records and vouchers received as exhibits, were stricken from the record, there would still remain in the record, among the cumulative proofs introduced *by the defendants*, the testimony of the defendants' witness Benjamin Cohen, the accountant employed by the defendant Public Service Commission (Record, page 977), who made an exhaustive examination of the complainant's records and operations, in part, as follows (Record, pages 1155-1156):

> "Q. Is it your testimony that the true operating results of this company's business as you

gather it from their books is as shown on this Exhibit A-13?

A. It is my testimony that the result their books show is as shown on this Exhibit A-13, especially the net result down below.

Q. In other words, it is your statement that in 1909, according to their books, you found that they sold their gas at a profit of 40.53 cents per 1,000 cubic feet?

A. That is correct.

Q. And that it dropped to 39.45 in 1910?

A. That is right.

Q. And to 32.57 in 1911?

A. That is right.

Q. It went up a little in 1912, dropped again in 1913, dropped some more in 1914, went up a little bit in 1915, a little more in 1916, dropped very substantially in 1917 down to 19.83 cents?

A. That is correct.

Q. And your testimony is that in 1918, according to their books, they only made 10.18 cents per 1,000 cubic feet?

A. That is right.

Q. *And in 1919 they lost 7.33 cents on every thousand cubic feet of gas sold?*

Mr. Neumann: According to their books.

Q. According to their books?

A. *That is right.*

Q. *That is your analysis of their books?*

A. *That is right.*

Q. And your statement as to their operating results as reflected in their books?

A. That is correct."

* * * * *

The Master: Just one other question, so I will get this clear. In your table 4-B, you show year ending December 31, 1919, a total sale of various classes, municipal, street lighting, buildings, prepayments, commercial meters of 336,241.4 thousand cubic feet, is that right?

The Witness: That is correct.

Q. So that your testimony is in substance that for the year 1918 their net profit was $33,600 at about 10 cents per cubic foot?

A. The net profits for 1918 were $33,350.56.

The Master: Where is that figure, where did you read that figure from?

The Witness: On Schedule 4-B.

Mr. Neumann: In that connection I would like to call the Court's attention to the fact that we contend that the item underneath that column totalling approximately $2,300, should be added to that amount, so that the total operating income of that year would be $35,000 odd.

Q. Taking for the year 1918, Exhibit A-13, the excess of revenues over deductions, the 10.18 is arrived at by dividing the amount shown on Exhibit A-12, $33,350.56, by the total quantity of gas sold. Is that correct?

A. That is correct.

Q. And the same for 1919?

A. The same for 1919.

Q. And the other years as well?

A. That is correct.

Mr. Neumann: In connection with 1919 I would like to call the Court's attention to——

Mr. Goetz: I do not like to be interrupted in this way, it is hard to follow these figures.

Mr. Neuman: In the year 1919, among the items that we claim should be included in the year 1919, but which have not been included in the computation is this amount of $15,518.73 for the rate case.

The Master: I understand those things, Mr. Neumann. Let Mr. Goetz make his record. I have this thing pretty clearly in my mind."

And we may note, parenthetically, that the question of the inclusion of the rate proceeding expenses in the 1919 operating expenses was about the only

one raised by the defendants by way
of the complainant's operating figures.

uld still be left in the record the evidence
by the defendants in the testimony of
Record, pages 1181-1182) that the com-
plant was "well maintained", and the
defendants' exhibits:

ral Ledger No. 2 of the New York &
ueens Gas Company (Record, page 987).
untant Cohen's Schedule No. 3 entitled
Materials and Supplies, 1904-1919" (Rec-
d, p. 1761; Orig. p. 2809).
untant Cohen's Schedule 4-B entitled
Gas Operating Revenues and Revenue
eductions" 1909-1913, 1914-1919 (Rec-
d, p. 1761; Orig. p. 2811).
untant Cohen's Schedule No. 5 en-
led "Gas Operating Revenues and Rev-
ue Deductions (Company's Books) per
000 cu. ft. of gas sold, 1909-1919" (Rec-
d, p. 1761; Orig. p. 2812).
untant Cohen's Schedule No. 6-B, en-
led "Details of Operating Expenses,
14-1919" (Record, p. 1761; Orig. p.
14).
untant Cohen's Schedule No. 10, en-
led "Gas Operating Revenues and Ex-
nses for first three months of 1919 and
20" (Record, p. 1720; Orig. p. 2830).
Annual Report to Public Service Com-
ssion, entitled "Station Cost of Material
d Labor in gas made (excl. General Ex-
nses, Taxes, Insurance, Renewals, etc.)"
Record, p. 1776; Orig. p. 2839).
Annual Report to Public Service Com-
ssion for 1918 entitled "Station Cost of
terial and Labor in Gas made (excl.
neral Expenses, Taxes, Insurance, Re-
wals, etc.)" (Record, p. 1780; Orig. p.
42).

15

A-52. Monthly Statistical Report for 1919 showing cubic feet of gas made, sent out, etc. for 1918 and 1919 (Record, p. 1795; Orig. p. 2875).

A-53. From Report to Public Service Commission for 1919 entitled "Details of Gas Manufacturing Expenses at each Station" (Record, p. 1795; Orig. p. 2876).

A-54. From Annual Report to Public Service Commission for 1918, entitled "Details of Gas Manufacturing Expenses at each Station" (Record, p. 1795; Orig. p. 2878).

The foregoing exhibits introduced by the defendants relate wholly or principally to details of operation and of revenues and expenses. The Master referred to this fact in the following statement (Record, page 47):

> "The defendants also offered in evidence data showing the operating results, the unit quantities of materials used, the unit costs thereof, and other information as to the revenues and expenses of the complainant company during the years from 1901 to 1920. Various of the underlying records of 1918 and prior years were also produced in Court at the instance of the defendants, and various of the entries in the books of the complainant and its predecessor company were placed in evidence by the defendants."

In addition, there were numerous exhibits introduced by the defendants corroborating the complainant's evidence as to charges and credits to its capital accounts.

The following statement made in the appellant Wallace's brief (page 3), is absolutely correct:

> "Appellants submitted data showing the operating results, the unit quantities of mate-

> rials used, the unit costs thereof, and other information as to revenues and expenses of respondent during the years from 1906 to 1920."

The findings of the Master and of the Court below as to the revenues and expenses of the appellee and the details of its operations and business, during the period taken by the Court as a test, are confirmed in all essential details by the evidence introduced by the defendants.

(2) *The Controlling Conditions of the Appellee's Operations.*

Ex-Justice Hughes, in the *Brooklyn Borough Gas Company* case (17 N. Y. State Dept. R. 81), expressed the sound rule by which the compensation to which this complainant is entitled must be gauged when he said:

> "A public service corporation is entitled to be reasonably compensated for its service and the *actual cost* of its operations must *always* be taken into consideration in determining whether or not it receives a fair compensation above the cost."

The distinguished jurist was there dealing with the contention of the appellants reiterated in this and companion cases that the *average* cost, over a number of years, not the *actual* current cost, of operation was the measure of compensation under a rate the constitutionality of which was attacked.

The appellee possesses a single manufacturing plant, at which it produces the gas necessary for the requirements of its consumers. There is no other source of gas available either to the complainant or to its consumers. In this respect the appel-

lee's situation is different from that of certain other companies in the Consolidated Transfer-of-Gas System in the Boroughs of Manhattan and The Bronx and in Long Island City, which can draw gas from several manufacturing plants. It is, therefore, the conditions at the appellee's plant, and not those at some other plant, which control its operating results.

(3) *The Uncontroverted Proof Submitted by the Appellee.*

The appellee called several witnesses to testify concerning details and cost of its operations and business. Mr. Spear, its Vice-President and General Manager, who has been in the public utility business for many years and has had extensive training and experience both on the technical side and on the executive side of the business (Record, pages 178-180); Mr. Woods, one of the most eminent gas engineers in the country, in direct charge of the manufacturing and holder plants of the companies of the Consolidated Gas System, and supervising and consulting engineer of the complainant (Record, pages 398-402); Mr. Morrison, the superintendent of the company's plant, who has had long experience in the gas business (Record, pages 569-571); Mr. Raynor, the Company's Secretary in charge of its accounting system (Record, pages 262-263), and Mr. Foy, the company's bookkeeper (Record, pages 287-288).

It also called Mr. Addicks, a distinguished engineer and Vice-President of the Consolidated Gas Company, who handles the purchases of coal and oil for companies in the system, including the appellee (Record, pages 317-319); Mr. Gawtry,

an executive of a financial institution who was formerly a Vice-President of the Consolidated Gas Company and in charge of coal purchases for the same companies (Record, pages 524-526); and Colonel Miller, an eminent engineer with a long and varied experience in construction and operation of gas plants and apparatus, who had examined and appraised the complainant's plant and distributing system (Record, pages 241-249).

The appellants failed to call any witness who would controvert the testimony of the complainant's witnesses concerning the reasonableness of the cost of the principal materials, such as coal, oil, cast iron pipe, etc., used in the manufacture or distribution of gas by the complainant; or who would testify that the company's expenditures were extravagant, or its methods of operation were improper or negligent, or its employees were incompetent, or that gas could be made in a plant such as the complainant's with the use of less coal, oil, labor, etc., than was actually used under the actual conditions.

It is most significant that the defendants called as a witness Mr. Hine, who had been Chief Gas Engineer of the defendant Public Service Commission from 1911 to 1919, who had made many investigations of gas service and service standards (Record, pages 1170-1171, 1174), who claimed a miscellaneous experience in the operation of gas plants (Record, page 1172), and who had examined the complainant's plant and had "done a great deal of miscellaneous work in connection with that company" (Record, page 1176), but that the defendants asked him no question whatever which might elicit any criticism of the methods and

efficiency of operation of the appellee or of the condition or maintenance of its property. No evidence was presented that during its whole existence the defendant Public Service Commission had at any time had occasion to require changes in the plant, apparatus or methods of operation of the complainant. Nor was the Chief Gas Engineer of the defendant Public Service Commission who succeeded Mr. Hine, or any member of his staff, called as a witness to give testimony in criticism of the practical operation of the complainant's plant or the conduct of its business.

It is respectfully submitted that the failure of the defendants to call these witnesses or interrogate them, justifies the strongest inference that the evidence presented in behalf of the complainant in these respects could not be impeached.

Cost of Production and Distribution.

It is contended by the appellants (Appellant Newton's Brief, pages 40, 61; Appellant Wallace's Brief, pages 97-98), that, if the findings of the Court as to the reasonable and necessary operating expenses were reduced by certain amounts as claimed by the appellants, there could be derived a net income for the year 1919—the test period used by the Court—in an amount sufficient to indicate a substantial return upon the complainant's property.

The following is a comparative table of the revenues and expenses for the year 1919 as claimed by the appellee (Exhibits 64 and 65; Record, pages 1569, 1573; Orig. pp. 2496, 2500), as found by the Master (Record, pages 38-40), and as allowed by the Court (Record, pages 111-112):

MPARATIVE STATEMENT OF AMOUNTS CLAIMED BY COMPANY AND AMOUNTS ALLOWED BY THE MASTER AND THE COURT.

REVENUES AND EXPENSES OF THE GAS BUSINESS PER THOUSAND CUBIC FEET OF GAS SOLD.

	CLAIMED BY THE COMPANY		ALLOWED BY THE MASTER		
	1919 Actual Ex. 64	As of May 1921 Exs. 77 and 90	1919	As of July 1920	ALLOWED BY THE COURT 1919
st of Production.....	$ .7173	$ .7127	$ .7173	$ .8427	$ .7090
st of Distribution.....	.3200	.3982	.2700		.2707
newals and Replacements.	.0300	.0300	.0300		.0300
xes	.0707	.0708	.0707		.0707
tal Cost of Gas Sold.....	$1.1380	$1.2117	$1.0880		$1.0804
scellaneous Operating Revenue	.0675	.0675	.0675		.0675
t Expenses.....	$1.0705	$1.1442	$1.0205		$1.0129
come from Sales.....	.3951	.3951	.3951		1.0000
Net Loss.....	$ .0754	$ .1491	$ .0254		$ .0129

The deductions made by the Master from the actual operating expenses for 1919 are as follows:

Defensive Emergency Service (Record, page 52)	$747.46
Rate Proceeding Expenses (Record, page 52)	15,518.73
The further deductions from operating expenses or credits made by the Court below are as follows:	
Interest on Insurance Participation Certificates (page 112).....	57.58
Interest on Unpaid Taxes (pages 111, 117)	233.71
Total	$16,557.48

The Court reduced the "unaccounted-for gas" from the actual of 11.03 per cent. accepted by the

Master to 10 per cent., reducing the cost of gas production from 71.73 cents to 70.90 cents per thousand cubic feet of gas sold, or by .83 cents per thousand cubic feet of gas sold.

The Court increased the income from sales of all gas from the amount actually received of 99.51 cents per thousand cubic feet of gas sold to $1.00, in order to treat the sales of gas to the City at the statutory rate of 75 cents per thousand on a parity with the sales of gas to private consumers at the rate of $1.00 per thousand, thereby adding an unrealized income of .49 cents per thousand cubic feet of gas sold.

The Court, in its opinion, stated that—

> "In that spirit of caution, the Court may eliminate for the purposes of the case some contentions which might be successfully pressed in a rate case pure and simple" (Record, page 109).
>
> "In arriving at this figure, it will be appreciated that I have stripped the constituent items down to their lowest minimum" (Record, page 112).

The Legislature of New York State, in prescribing a rate of one dollar for gas service in the territory served by the appellee, from and after the year 1910, at the same time that it prescribed a rate of 80 cents for gas service in other metropolitan territory (Chapter 125, Laws of 1906), recognized the wide differences between the necessary costs of operating in the suburban and sparsely settled territory of the complainant and those in other areas in the City of New York in which there is a congestion of population and a concentration of in-

dustries. Nothing has since transpired to remove or reduce the relative differences in cost of operation or to warrant a change in the differential. On the contrary, many factors have contributed to the necessity of increasing the differential. Obviously, if the 80 cent rate is not compensatory and is unconstitutional as to gas service in territory in which the 80 cent rate was originally prescribed, the dollar rate cannot possibly be remunerative and compensatory in the territory served by the complainant.

The briefs in behalf of the appellants make reference to the fact that in other water gas plants such as that of the Consolidated Gas Company, the smallest of which is many times larger than the plant of the complainant, there are not required the use of certain quantities of material and certain operating expenses, per thousand cubic feet of gas made or sold, as in the case of the complainant. But, in the case of a small company with a small plant, there are certain units in the cost of manufacture that are higher, and the legislature recognized that fact when it created a differential between the rate applicable to the complainant's territory and the rate applicable to the Consolidated Gas Company's territory.

Principal Exhibits of the Appellee as to Operations.

It may perhaps be of convenience to have indicated the relatively small number of exhibits which disclose in concise and graphic form the details of the complainant's operations and properties as established by the evidence, and in which exhibits

are shown the details of any items as to which controversy may arise upon the argument:

EXHIBIT 47: Tinted map showing real property owned and used by the complainant (Record, p. 1480; Orig. p. 2389).

EXHIBIT 48: A series of 17 photographs showing the buildings, holders, etc., of the complainant's plant (Record, p. 1480; Orig. p. 2390).

EXHIBIT 58: Sheets showing the rates of pay per hour in all departments of the company, from 1911 to 1920 (Record, p. 1567; Orig. p. 2489).

EXHIBIT 59: Statement showing the unit prices paid for generator and boiler coal and for gas oil, from 1911 to 1920 (Record, p. 1567; Orig. p. 2491).

EXHIBITS 60, 61 AND 62: Comparative statements showing the unit prices paid for materials other than coal and oil, from 1914 to 1920 (Record, pp. 1567, 1568; Orig. pp. 2492-2494).

EXHIBIT 64: Detailed statement of the unit costs of the production and distribution of gas during 1919, prepared by Mr. Teele, a certified public accountant of high standing and wide experience (Record, p. 1569; Orig. p. 2496).

EXHIBIT 65: Detailed statement of the revenues and expenses of the complainant's gas business during 1919; also prepared by Mr. Teele (Record, p. 1573; Orig. p. 2500).

EXHIBIT 66 FOR IDENTIFICATION: Detailed inventory and appraisal of all the complainant's property; received as Colonel Alten S. Miller's testimony and printed in full at pages 559 *et seq.* of the Record.

EXHIBIT 77: Table prepared by George E. Woods, a gas engineer of many years' experience, showing the unit operating costs under the conditions obtaining in the complainant's plant (Record, p. 1596; Orig. p. 2534).

EXHIBIT 96: Detailed schedules showing the cost to the complainant of the property acquired by it in 1904 and still in use, and the cost of property added since that time (less withdrawals) (Record, p. 1605; Orig. p. 2563).

EXHIBITS 112 AND 113: Map and statement showing land purchased by the complainant and the cost thereof (Record, p. 1719; Orig. pp. 2706, 2707).

EXHIBIT 115: Statement comparing the cost of production and distribution, and the complainant's revenues and expenses, during the first five months of 1920 with the same details for the first five months of 1919 (Record, p. 1727; Orig. p. 2722).

Inspection of the list of Exhibits will disclose that all coal and oil vouchers, oil contracts, bills for other materials, payrolls, tax bills, manufacturing records, books of account, and other supporting data, and the like, for 1919 and five months of 1920, were placed in evidence, together with the pertinent regulatory orders of the defendant Public Service Commission.

Cost of Production.

After reviewing the record and hearing argument the Court below disposed of the defendants' (appellants' in this Court) exceptions (Record, pages 110-111, as follows):

> "The Cost of Production.—Some attack has been made in respect of the cost of oil. An examination of the record shows clearly that the oil accounts were carefully kept and checked. Most of the slight errors during the course of a month were corrected and the most generous acceptance of the contentions of the defendants would result in a variance of a few gallons which, translated into money, would be equivalent to a fraction so negligible as to amount to an infinitesimal part of a mill.
>
> The cost of other materials and of labor is attacked not on the basis of evidence adduced but, as it were, on general principles. The suggestion is that certain increased costs are suspicious. Yet there is nothing suspicious in the testimony, and it is a matter of common knowledge that during the year 1919 the cost of materials such as are here concerned, and of labor, rose materially in this and other industries. An examination of the testimony, including the exhibits, leads readily to the conclusion that the Special Master was right in his figures. It was made entirely plain that these costs, in the main, were greater in the first five months of 1920 than in 1919. The point of the inquiry in respect of 1920 was to ascertain whether there was any likelihood that the cost of 1919 had decreased or would decrease and no such hope was realized."

The Master described the scope of the proofs offered by the complainant and by the defendants, and the examination and analysis made of the complainant's summaries of proof by the defendants'

counsel, accountants and engineers (Record, pages 47, 48-49), and he summarized his conclusions as to the unit quantities of material and labor used by the appellee as follows (Record, page 50):

> "The first question to determine is whether the quantities used by the complainant company as they appear from the books and records of the company are correct and set forth a reasonable and necessary use of materials and of labor, or whether there has been a waste of gas-making material and unnecessary use of labor forces and the books do not accurately reflect the quantities actually needed and used. I have analyzed these figures in the light of the defendants' proofs and also of the sworn testimony given by Mr. Woods, an operating engineer of wide experience produced by the complainant company, whose testimony has not been directly attacked or contradicted by any witness. Except for some minor variances when contrasted with the 1919 operating results, such as his estimate of 'unaccounted-for' gas at 10 per cent. (the record for 1919 shows 11.93 per cent.), his slight under-estimate of the required boiler fuel, and the slight difference as to the figures given by him for the gas oil required, it may be said that the results shown in the operating records closely accord with the sworn expert opinion of Mr. Woods, and are confirmed by his judgment as to the results which might reasonably be looked for and secured."

Location of Plant.

The appellee owns and uses a plant for the manufacture and distribution of carbureted water gas, located at Myrtle Avenue and Farrington Street, in the former Village of Flushing, in the Third Ward of the Borough of Queens, New York City (Finding No. 6; Record, page 34). The plant

has been and is "maintained in excellent operating condition" and is "in as high a state of efficiency as if new" (Finding No. 32; Record, p. 41; see, also, testimony of Spear, Record, pages 738-739; Woods, Record, page 435; Miller, Record, page 656; Hine, Record, page 1181).

Without any evidence whatever in the record to support it, the contention is made for the first time by the appellant Wallace (Brief, page 15) that, if the complainant's plant were located on the waterfront, which is one-half mile distant from the present site of the plant, "the fair cost of unloading coal from barge direct to coal pits would not exceed ten cents per ton", and it is, therefore, argued that the cost to the complainant of coal handling from the point of unloading to the coal pile is excessive. This contention was not suggested by any exception to the Master's report or by any assignment of error in this Court. The only evidence on this question in the record negatives this claim. Mr. Woods testified (Record, page 432):

> "The amount of money involved, however, in the transportation would not justify the abandonment of the plant for the purpose of putting it on the water; the amount expended for the purpose of putting it on the waterfront would not justify any changing from the present location of the plant."

The appellants' criticism as to coal-handling was confined to the lack of direct rail connection to its plant. In assignment of error No. 35 (Record, page 133) the appellants asserted that—

> "The cost of handling coal would be very much less if complainant company were to construct sidings from the railroad company to the plant which would result in a saving of at least fifty cents per ton."

The same suggestion is made in the appellants' Thirteenth exception to the Master's findings (Record, page 69).

This subject was referred to upon the cross-examination of the witness Woods (Record, pages 432-433), from which it appeared that the plant is some 200 feet from the railroad tracks and that a railroad siding cannot be installed unless and until the acquisition by the complainant of sufficient intervening land to enable it to avail itself of this facility. As shown by Exhibit 47 (Record, p. 1480; Orig. p. 2389), the complainant's land does not at any point extend to the right of way of the railroad from which it is urged such a siding should be built. Obviously, any saving in the cost of coal effected by the installation of such a siding would be to a substantial extent offset by the additional investment required, which would result in additional carrying charges, increased maintenance expense and more property upon which a fair return would have to be allowed, but for which the appellants make no provision in the calculation of the necessary return.

Generator Fuel and Boiler Fuel.

The Master found (Finding 13, Record, page 37):

> "13. In the manufacture of water-gas under the conditions obtaining in a plant such as that of the complainant, there is required the use, per thousand cubic feet of gas made, of approximately 37 pounds of anthracite coal of the grade of coal being supplied in recent years, or its fuel equivalent, of which approximately 34 pounds are used in the generators, and approximately three pounds are used

under the boilers. In addition, there is also required to be used under the boilers approximately nineteen pounds of bituminous boiler coal or its equivalent in water-gas tar (one gallon of such tar weighing nine pounds and one pound of tar having a fuel value of about 1.7 pounds of the grade of boiler fuel now and recently supplied). The plant and operating conditions of the complainant company require the use of slightly more boiler fuel per thousand cubic feet of gas made than would be required if it were not under the necessity of compressing a portion of the gas sent out in order to reach the distant community of Douglaston and Douglas Manor, hereinbefore referred to."

The appellant Newton's contention as to the use by the complainant in 1919 of an excessive amount of coal is made only in respect to boiler fuel, for which a deduction is claimed from operating expenses of $5,367.21 or 1.4 cents per thousand made (Brief, page 58). The appellant Wallace, however, contends that the cost of both generator fuel and boiler fuel is too high, because of the method of unloading coal, of the lack of proof by the gas-makers personally as to the quantities used by them, and of an alleged use of an excessive quantity of coal (Brief, pages 13-48).

In so far as the contention of the defendants is based upon their "purely negative attitude" toward all the evidence presented by the complainant, which ostrich-like, shuns not only the complainant's but also the defendants' evidence of the details of operation, it cannot be taken seriously; and we shall discuss it only from the standpoint of any possible merit.

Mr. Woods said that average operations in such a plant would require the use in the generators, per thousand cubic feet of gas made, of 37 pounds of anthracite generator coal, "of which about 34 pounds would be used in the generator and three pounds would be fine screenings which could be used for boiler purposes" (Record, page 410). In 1917 there was used in the generator 37.17 pounds (Ex. 100, Record, p. 1023; Annual Rept. Ex. A-53, Record, p. 1795; Orig. p. 2881); in 1918, 34.69 pounds (Annual Rept. Ex. A-32, Record, p. 1780; Orig. p. 2842); in 1919, 34.59 pounds (Ex. A-29, Record, p. 1776; Orig. p. 2839); during five months of 1920, 36.57 pounds (Ex. 115, Record, p. 1727; Orig. p. 2722).

As to boiler fuel, the Master found that 19 pounds of bituminous boiler coal or its equivalent in water-gas tar was required in addition to 3 pounds of anthracite coal (Finding No. 13, Record, page 37).

Mr. Woods said that at least 22 pounds of boiler coal or its equivalent in tar would be required. In 1919, 16 pounds of coal and 0.7 gallons of tar were used—the total equivalent to 26.71 pounds of coal. In 1918, 16.69 pounds of coal and 0.5 gallons of tar were used—the total equivalent to 24.34 pounds of coal. In 1917, 16.3 pounds of coal and about the same quantity of tar—a total equivalent to about 24 pounds of coal. During five months of 1920, 15.65 pounds of coal were used and 0.6 gallons of tar,—a total equivalent to 24.83 pounds of coal (*Ibid*).

The appellants would limit the allowance for boiler fuel to the average over the years 1913 to 1918, inclusive (Appellant Newton's Brief, page 58; Appellant Wallace's Brief, page 47). How could gas have been produced in 1919 if the gas

makers had been limited to an average of materials used in past years when they required under present conditions a greater quantity? This average, of course, included nothing by way of additional boiler fuel which has been necessary since November, 1919, when service on the Douglaston Extension was opened, for the purpose of pumping at high pressure a portion of the gas sent out in order to reach that distant community (Record, page 745).

Counsel for the appellants confuse the testimony of Mr. Woods and the findings of the Master as to the quantity of boiler fuel ordinarily required, and the quantity actually used, because they overlooked the fact that Woods, in his Exhibit 77 (Record, p. 1596; Orig. p. 2534) specifically calls attention to the fact that over and above the ordinary requirements of coal for boiler fuel there is required *additional* boiler fuel on account of steam used for high pressure transmission in supplying Douglaston extension under order of Public Service Commission for the First District.

The appellants would find an inconsistency between Mr. Woods' testimony in the present case and his testimony in the *Consolidated Gas Company* case where he testified concerning the quantities of material and labor required in the operation of a plant producing an average of ten million cubic feet of gas a day (for this plant he used an average of one million cubic feet of gas per day), and where he testified to 14 pounds of boiler fuel. Mr. Woods explained (Record, pages 429, 430) that the capacity of the plant would have something to do with it, shutting it down (not operating the full twenty-four hours), keeping it warm in the winter time, and the radiation loss would

be greater with that plant than it would be with a larger plant. He further testified that it takes eight more pounds in the production of only a million cubic feet of water gas than it does in the production of ten million cubic feet of water gas (Record, page 431). In the plants of the Consolidated Company there were operated ten-, eleven- and twelve-foot machines, while the complainant used seven-foot six and eight-foot six machines (Record, page 431). As a matter of fact, on the Consolidated System as high as 17 pounds of boiler fuel had been actually used (Record, page 477).

The criticism of the inadequacy of the receipt and disposition of coal (Appellant Wallace's Brief, pages 20-28, 34-38) is dispelled by the quotations from the testimony as set forth in that portion of the brief.

Gas Oil.

The Master found 4.2 gallons of gas oil were necessary in the plant of the complainant in manufacture per thousand cubic feet of gas (Finding No. 11, p. 36):

> "11. In the manufacture of water-gas of the statutory standard of 22 candle power, under the conditions obtaining in a plant such as that of the complainant, there is required the use, per thousand cubic feet of gas made, of approximately 4.2 gallons of gas oil of the gravity and quality now being supplied to the complainant, and the complainant did, in fact, use on the average 4.19 gallons per thousand cubic feet of gas made, during the year 1919."

But the Master included in the operating expenses for 1919 the use of only 4.19 gallons of gas oil.

In a plant such as that of this complainant, not making gas throughout the year on a twenty-four hour basis, Mr. Woods said not less than 4.2 gallons of oil would be required, on the average, per thousand cubic feet of gas made.

The statistical exhibits show in 1917, this company used 4.43 gallons; in 1918, 4.26 gallons; in 1919, 4.19 gallons; during five months of 1920, 4.38 gallons per thousand cubic feet of gas made.

No contention is made by the appellant Newton in his brief that the allowance was unreasonable. While the Master held 4.2 gallons to be a reasonable quantity, the amount taken by the Master in the cost of production included only 4.19 gallons per thousand cubic feet of gas made. The allowance by the Master of the actual figure which is somewhat less than Woods' deemed reasonable on the average, does not justify the criticism by the appellant Wallace (Appellant Wallace's Brief, page 48). There is no inconsistency, as is sought to be attributed to Mr. Woods, between his testimony in the Consolidated Gas case where he testified to 4.1 gallons, and the testimony in this case to 4.2 gallons, in view of the dissimilarity of operating conditions. Mr. Woods testified that, in order to secure the statutory 22-candle power standard on the distributing system, there would be required the production of gas of from 23 to 26 candle power, in a plant of this kind and for this district, as the fact that the mains are smaller and the distance is greater tends to reduce the candle power on the system and to require a higher candle power at the works in order to maintain the statutory candle power throughout the distributing system (Record, pages 415-416). Mr. Woods also testified that, in shut-

ting down a plant, as would be necessary in the case of the appellee's plant, there would be somewhat less efficiency as compared with a larger plant which was in continuous operation, and that the oil efficiency would also be diminished by a poor quality of coal (Record, page 434).

The Corporation Counsel's brief in behalf of the appellant Wallace, who took no active part in the trial, endeavors to exaggerate the importance of alleged discrepancies as to gas oil in the so-called "daily record of manufacture" kept at the complainant's works, which, however, did not at all enter into the charges in the *cost* of gas oil used which were made in the complainant's books of account and which were in turn summarized by Mr. Teele in his Exhibit 64 (Appellant Wallace's Brief, pages 62-67), and which are, therefore, in no way consequential to the results in the case. The oil vouchers and the New York Produce Exchange certificates of quantities and qualities are all in evidence (Exs. 63 and 87). The company *pays for* what it receives as shown by these certificates, and these quantities are fully confirmed, as we shall show. The Teele exhibits, in so far as they relate to gas oil as an element in the cost of manufacture, present the total amount of money actually paid for gas oil and the total number of gallons actually used, ascertained by taking the inventoried quantity on hand at the beginning of the year, and adding to it the number of gallons received, as shown by the vouchers and New York Produce Exchange certificates, and deducting the quantity measured as on hand at the end of the year. For a complete understanding of the method by which oil is received into the tanks and afterwards accounted for daily, reference is made to the testimony of Mr. Morrison,

Superintendent of the Works, at pages 573 *et seq.* of the Record.

When a boat-load of oil is received, it is pumped into the tanks at the works through a pipe line and the tanks are measured before and after the pumping to determine the quantity of oil received from the barge. This measuring is accomplished by means of a scale on the outside of the tank, and by a plum-bob. The amount of oil used in the course of a day's manufacture is determined by measurement of the tanks and verified by meter measurement at the gas machines (Record, page 574). It is possible, therefore, to determine every day the amount of oil used for the quantity of gas produced, and that is done daily.

The first alleged discrepancy claimed by the defendants was with reference to the daily record of manufacture for January, 1919, introduced in evidence as Defendant's Exhibit "A". It will be observed that the column headed "Oil Used"—which shows a total in red ink of 146,964, indicates the amount, in gallons, for each day of the month. If the figures in this column are added up, the total will appear to be 149,964, as was brought out on the cross-examination of Mr. Morrison (Record, pages 578-579). This would appear to be a clerical error calling for explanation until we observe in what method the total amount of oil used is derived and how the supposed error occurred. In the column immediately to the left of the column marked "Oil Used" is a column marked "Oil on Hand 7 A. M."; the amount of oil used each day is determined by subtracting the amount of oil on hand in the tanks as ascertained by measurement from the amount on hand the previous day at

7 A. M. Thus the amount of oil used on the first day of the month will be found to be the difference between 68,610 gallons and 63,604 gallons, the amount on hand at 7 A. M. on the first and second days respectively. On the 18th an error in subtraction of 1,000 gallons was made by the clerk, and another error of 2,000 on the 22nd, resulting in two misstatements in the "Oil Used" column, amounting to 3,000 gallons. If the column headed "Oil Used" had then been added up correctly and the total, 149,964, carried down to the recapitulation in the lower right-hand column of the sheet, this error would then have found its way into the books. *This was not done, however,*—the total 149,964 not being derived by adding the column of oil used each day, but by taking the stock on hand at the beginning, 68,010 gallons, adding to it the amount bought during the month, 131,618 gallons, producing a total oil to account for during the month of 192,628, and subtracting therefrom the amount on hand on the last day, namely, 52,664 gallons, which produced 146,964 gallons (see computations in the lower right hand corner of the sheet). This amount was then inserted as the total oil used. *The total so inserted is the correct total,* and the clerical errors occurring during the month were thus entirely eliminated by the practice of proving the stock account and did not find their way into the books of account, which contain only the correct totals.

But even if this error of 3,000 gallons had found its way into the final computations, what effect would it have had upon the result for the month? As shown by Defendants' Exhibit "A" (no item of which was in any way challenged except the oil figures now under discussion), the total make of

gas during that month was 32,903,000. An error of 3,000 gallons of oil, therefore, would have amounted to .09 of a gallon per thousand cubic feet. Taking this at the rate of 6.7¢ per gallon (Finding No. 12) would produce six mills per thousand cubic feet as the total effect of the clerical error pointed out by the defendants. But even this error was eliminated at the end of the month, and did not find its way into the books of account.

Instead of reflecting upon the accuracy of the books of account and records of the complainant company, the occurrence of this trivial error and its discovery and elimination before it found its way into the books of account and records of the complainant company, rather emphasizes their accuracy and reliability, for out of the hundreds and thousands of entries upon these twelve sheets for the year 1919, this was *the only clerical error* pointed out by the defendants, after weeks and months of careful checking by their accountants. And, as we have shown, this error was absorbed and completely wiped out at the end of the month by the method used of determining the oil used by means of the inventory of the stock on hand at the beginning and the end of the month.

Another alleged error is upon the sheet for February, 1919 (Defendants' Exhibit "B", Record, page 583). Here it appears that on February 3rd record was made of the receipt of 118,311 gallons which was later stricken out, and the amount 118,639 gallons inserted, a difference of 228 gallons. The subtractions and additions from day to day were correctly computed upon the amount first set down. The total stock account for the month was

correctly worked out after it had been determined what the exact amount of oil received amounted to by means of the certified invoice rendered by the Oil Company and certified to by the inspectors of the Produce Exchange. Gas oil varies in volume considerably according to its temperature, so that the oil measured by the oil company's inspectors at the time it is shipped may be of a different temperature and different volume when it is received at the works, but no allowance is made for this until the bill is received from the Standard Oil Company (Record, pages 601-604).

The next alleged discrepancy pointed out was upon the June sheet, marked Defendants' Exhibit "C", in which it appears at the bottom of the column "Oil Used" that an addition of 500 gallons was made to the total amount shown in that column. This was done "to make up some of the discrepancies that appear in the oil received and the oil that was billed for" (Record, pages 584-585). There was a 500 gallon discrepancy, apparently due to difference in temperature at the time the oil was measured, which appeared in the invoices received from the Oil Company, not necessarily in the same month. The same thing occurred in the month of November, when 2,000 gallons were added to the oil to cover apparent discrepancies in the invoices, and again in December, 1,000 gallons (Record, pages 585-586). So, also, as was brought out on cross examination of this witness, the December figures were changed to show that the amount for which the company was billed and compelled to pay was *less* than the amount its records indicated it had received.

All of these records which have been referred to, perhaps at unnecessary length, prove conclusively, not that the daily records are unreliable, but that they are carefully revised and corrected so as to eliminate not only all clerical errors, but also to take account of the changing volume of the gas oil and to have the daily records exactly correspond to the amount of oil for which the company is billed, and which it is required to pay for.

In addition to the foregoing, there are in evidence all of the oil vouchers for the year 1919 and for 1920, and attached to them, the certificates of the Produce Exchange as to quantities, and also, when necessary, memoranda of credits allowed by the Standard Oil Company for oil not received (Complainant's Exhibit 88, Record, page 617).

The alleged claim that the December records show 193,000 gallons, whereas the capacity of the tanks had been testified to be only 180,000 falls to the ground upon the testimony of Mr. Spear, General Manager of the complainant company (Record, page 617), stating that with the tanks full and the oil line extending from the tanks down to the dock, the capacity would be 193,000 or 194,000 gallons. The working capacity of the tanks up to the inlet pipe is about 180,000 gallons, but sometimes, if the cargo is a large one, the tanks are filled above the inlet pipe.

Thus a discrepancy of 300 or 400 or 500 gallons discovered upon the unloading of the barge would not be considered by the officers of the company until the bill was received (Record, page 637). A

larger discrepancy amounting to, say, several thousand gallons, would be taken up at once with the Standard Oil Company and a credit secured. This was done in January, February and March, 1920, where as will appear from the reports of manufacture offered in evidence by the complainant, credits amounting to some 8,000 gallons were allowed by the Standard Oil Company on account of the barge pulling out from the dock before it had completely unloaded (Record, page 636). The point of all this is that it is not the *daily* record of manufacture with respect to oil and coal and similar materials used in the manufacture of gas, but the inventory at the beginning and end of the month, which determines the quantities used and the quantities which shall be reported to the company and recorded in its permanent books. If the daily record of manufacture does not check with the inventory at the end of the month, the inventory governs and the daily record is corrected to conform therewith (Record, page 683).

We believe that the foregoing will completely dispel any shadow of doubt cast upon these records by the defendants. The total differences pointed out amount to 6,500 gallons, assuming (which is not the fact) that they found their way into the books of account. The total number of gallons of oil used during the year 1919, according to the twelve manufacturing reports in evidence was 1,590,785; of this, 6,500 gallons represents 4/10ths of 1%, a variation so infinitesimal as to be worthy of not a moment's regard. Translated into dollars at the rate of 6.7¢ per gallon, 6,500 gallons would make a difference in the annual expense for oil of $435.50, a mere trifle out of the $107,192.16 expended for gas oil

during that year, according to the books of account (Record, Exhibit 65).

Additional confirmation of the entire correctness of the records of manufacture in their final form is furnished by the testimony of Mr. Arthur W. Teele, one of the country's foremost accountants, who prepared Exhibits 64 and 65 from the complainant's books. With respect to oil, he testified (Record, pages 751-752):

> "I went back to the original invoices and the original entries of the inventory at the beginning of the year."
>
> * * * * *
>
> "The total aggregate of the quantity reported by the daily work reports agrees with the quantities of oil on hand at the beginning of the year plus the oil purchased during the year less the oil on hand at the end of the year."

And again, at Record, page 752, he elaborates the process of his checking as follows:

> "They are reported by the works manufacturer as having been consumed. The works manufacturer reports that he had on hand a certain quantity of oil at the beginning of the year, the vouchers duly approved and endorsed as showing the quantities of oil received during the year were submitted to me and examined by me, and starting with the admitted quantities of oil on hand at the beginning of the year and adding thereto the amount of oil acknowledged by the responsible authorities as having been received during the year, less the quantity of oil which that same authority admits as having on hand at the end of the year, I arrived at a quantity of oil which is to be accounted for, and that quantity of oil reported by the manufacturing department as having been used during the year, and I, there-

fore, have taken it for granted, or I have taken that quantity of oil as being the quantity of oil that has been used."

The appellee could scarcely have a better verification of the accuracy of its accounting method, and even of the substantial accuracy of the works records kept by the operating men, than the fact that these defendants, with a large force of accountants, devoting many weeks to this company's books and records, were able, with the most painstaking and critical scrutiny, to find only a few slight errors in arithmetic affecting only the works sheet for the day upon which it was made, but having absolutely no effect whatsoever upon the final result.

Uncontroverted Proof of the Reasonableness of the Cost of Gas Oil and Coal

The record affords no support for a contention that the prices paid by complainant for gas oil are or have been excessive.

This contention is now advanced in the brief of the Appellant Wallace (pages 48-62), who took no active part in the trial. The brief in behalf of the appellant Attorney-General does not refer to this point. In fact, the defendants called no witness who would testify that *at or about the time* the gas oil requirements of the complainant were contracted for, any dependable producer of gas oil was willing to enter into a *term* contract for the supply of gas oil in the quantity and of the quality required by the complainant, at a price lower than that fixed for the gas oil contracted for, to be supplied to the complainant's plant.

The requirements of the appellee for gas oil are included in the contract made by the Consolidated Gas Company to cover the requirements of itself and its affiliated companies. When the complainant requires a cargo of oil, it arranges direct with the Standard Oil Company of New Jersey for delivery of the same pursuant to the terms of the contract negotiated by Mr. Addicks (Record, pages 202 *et seq.*). Payment therefor is made directly by the complainant to the oil company.

The gas oil contracts for 1919 and 1920 were produced and received in evidence as Exhibits 71, 72, 73 and 74, and the subject of the prices at which oil could be secured was exhaustively covered by the testimony of Mr. Addicks, Vice-President of the Consolidated Gas Company, who has charge of the negotiations of oil contracts (Record, pages 319 *et seq.*), and also in certain respects by Mr. Spear, general manager of the complainant (Record, pages 215-217). There is also in evidence as Exhibit 59 a statement of the prices paid by the complainant for oil for a series of years and also comparative costs of coal and oil from 1914 to 1920, all of which are supported by the original vouchers showing the actual payment made by the company (Exhibit 63; Record, page 219; Exhibit 87, Record, page 676). No testimony or evidence of any kind was offered by the defendants tending in any way to show that oil could have been purchased for a less amount. On the contrary it was testified, and the Master found that the trend of oil prices at the time of the trial was sharply upward and that it would not be possible to secure a new contract at the expiration of the 1920 contract, or any supply of gas oil, at a price less than 10 cents per gallon (Finding No. 12; Record, page 37).

The good faith and the propriety of the oil contracts and the reasonableness of the prices therein contained, were sharply litigated upon the trial of *Consolidated Gas Company* vs. *Newton, et al.*, now before this Court, and the good faith of the Consolidated Gas Company's officers in negotiating the contract and the reasonableness of the prices paid, were attacked from every possible angle. After a thorough review of the testimony upon this subject, Judge Learned Hand, who rendered the final decision in that case on August 4, 1920, found that the prices paid by the Consolidated Gas Company pursuant to its contracts were paid in good faith and were reasonable (*Consolidated Gas Co.* v. *Newton*, 267 Fed. 231). He said (page 246):

> "It is clear beyond peradventure that, based upon New York prices, the charge is utterly baseless that the Company was paying more than the market, so far as there may be said to have been a market."

He added (page 247):

> "The charge of a sinister connection between the Company and the Standard Oil Company of New Jersey appears therefore to be without the slightest evidence, * * * I have no doubt that this [6.8¢ per gallon] was an honest price made in a genuine effort to do the best possible and it is certainly less than could have been got later in that year (1919); it is a most conservative figure for reckoning costs for the future, so far as can now be seen, and I accept it."

For a fuller discussion of this phase of the case, we refer to the Appellee's Brief on the Facts (Docket No. 257, Brief, Point III, pp. 145 *et seq.*).

The New York and Queens Gas Company has greatly benefited by its ability to secure gas oil under the contracts made by the Consolidated Gas Company; indeed, when the Consolidated Gas Company took over the arrangements for the supply of gas oil to the complainant, it succeeded in effecting a large financial saving to the complainant (Record, p. 346).

The purchase of coal, like oil, is made pursuant to contracts negotiated by officers of the Consolidated Gas Company for itself and affiliated companies (testimony of Mr. Addicks, Record, page 328 *et seq.*; testimony of Mr. Gawtry, Record, page 525 *et seq.*), whenever contracts for coal can be obtained. Recently such contracts have been unobtainable on the yearly basis, and purchases have commonly had to be made in the market. The unit prices paid for coal during a period of six years are shown in Exhibit 59, and the correctness of these figures is further verified by the various vouchers supporting the same (Exhibit 63), the coal contract under which coal was purchased during a portion of the period under consideration (Exhibit 80), and the coal vouchers for the first five months of 1920 (Exhibit 86). The Master's findings as to the cost of coal and other fuel (Findings 14, 15 and 16; Record, pages 37-38) are amply supported by this evidence, and there is no evidence by any defendant in any way contradicting the fact of the payment of such prices nor their reasonableness, nor tending in any way to show that coal could have been procured in any quantity whatsoever for any less price. The finding as to the recent cost of anthracite generator coal, $11.50 per gross ton at the works (Finding No. 14)

is supported by the testimony of Mr. Spear given on one of the last days of the trial (Record, page 1462).

Gas-Making Labor.

The Master found (Finding No. 20, Record, page 38) that there is necessary, in the manufacture of water gas, the employment of gas-making labor, and that in 1918, under the prices and the rates of pay then in force, the cost of gas-making labor in the complainant's plant was 4.67 cents, and in 1919, 6.31 cents per thousand cubic feet of gas made, and as of the then present time, the testimony showed that under average operations and the rates of pay and prices then in force, this item cost at least the sum shown for the year 1919.

The finding of the Master and of the Court concerning the amount to be allowed for gas-making labor is not challenged in the appellant Newton's brief. The brief of the appellant Wallace, however, contends that the proof of the employment of labor and the compensation paid to labor is not sufficient (Appellant Wallace's Brief, pages 67-90), and also that there is some inconsistency between Woods' figures to which he testified in the Consolidated case and the figures in this case. The figures in the Consolidated case were based upon a lower wage rate than was paid at the time Mr. Woods testified to in this case, and furthermore, Mr. Woods said (Record, page 442):

"A. * * * For instance, you have a gas maker who makes a million feet a day, in three shifts they would make a million feet for each of these machines, and in a larger plant, where they had larger machines, in a plant capable of handling larger machines that same gas-

maker would make three million, so for the gas-maker himself it would be three times as much as in the large plant where they have these large individual units. You could not afford to put up individual units of that kind in a plant like Flushing, you would have to rebuild the plant entirely in order to handle the proposition.

Q. Four cents more to make gas in a million cubic-foot company than in a ten million company.

Mr. Ransom: I object to that. He is comparing September, 1919, with April, 1920, whereas the proof in the Consolidated case showed two increases in pay after the September figure.

The Master: Objection overruled.

Mr. Ransom: Exception.

A. The gas-manufacturing labor in a plant such as exists there would be infinitely more than in a plant making ten million cubic feet a day."

Works Repairs and Materials.

The actual expenditure by the complainant in 1919 for repair labor was $10,101.99, or 2.66 cents per thousand cubic feet, and for repair material $17,843.55, or 4.69 cents per thousand, a total of $27,945.54, or 7.35 cents per thousand (Exhibit No. 61, Record, p. 1569; Orig. pp. 2496, 2497).

In his computation of the cost of gas made, the Master allowed the actual expenditures by the complainant for 1919 (Finding No. 21, Record, pages 38-39). This allowance is criticized by the appellants (Appellant Newton's Brief, pages 41-49; Appellant Wallace's Brief, pages 90-92). In appellant Newton's brief it is suggested that the allowance of the average for the five years from 1914 to 1918

would result in a deduction from the actual cost of 5.88 cents per thousand (Brief, pages 47-49), whereas in appellant Wallace's brief it is suggested with some leniency that the amount which should be deducted from the actual cost is 3.85 cents, reducing it to 3.05 cents per thousand (Brief, page 92). Thus, the appellant Newton would deduct from the actual cost $19,770.01 (Brief, page 61), but the appellant Wallace would deduct only $12,945.29 (Brief, page 92).

We do not perceive how the unavoidable repairs in a plant can be made upon any theoretical basis of averages. Had the Public Service Commission issued an order to the company to make the repairs, would it have been a tenable answer that the order requires the expenditure of a greater sum than the average spent during a period of ten years? The fact that the complainant's repairs cost during 1919 substantially more than they did, on the average, during the four or five years preceding, is in no way surprising. The appellants have failed to take into account considerations which above all others stand out in this record: The rates of pay for the labor and the prices of the materials used in the maintenance and repair of a gas plant, distributing system, and appurtenant property have advanced sharply and continuously since 1914. In 1919, these elements of cost were in many cases more than 100% greater than they were in 1914, and they were still advancing (Complainant's Exhibits 58, 60, 61; also Spear, Record, pages 1438, 1459-1460). There was also a lessening of the efficiency of labor—more men and more hours were required on an equivalent repair job. It would be strange indeed, and a matter really calling for explanation, if during a period of rising prices the unit cost of repairs remained

stationary. If the same repairs were made on the average in each year, we should expect the cost per unit as well as the total cost to increase with rising price levels; if they did not so increase, the inference to be drawn therefrom would be that the company was neglecting its repairs. The fact that the 1919 cost of repairs was about double that of 1915, if it requires any inference at all, tends to show that the company in 1919 was keeping its plants in at least as good repair as it was in 1915.

Cost of Distribution and Other General Expenses.

The actual cost of distribution claimed by the complainant for the year 1919 was $107,597.82 or 32 cents per thousand cubic feet of gas sold (Complainant's Exhibit 64, Record, p. 1569; Orig. p. 2496), exclusive of renewals and replacements (3 cents per thousand) and taxes and interest thereon (7.07 cents per thousand). The Master allowed approximately 27 cents (Record, page 52), instead of 32 cents as claimed. He eliminated $15,518.73 charged in 1919 to the account of the present rate case, and $747.46 charged for defensive emergency service, or a total of $16,266.19, which, deducted from the actual expenses of $107,597.82, gave $91,331.63 (Record, page 52).

In reviewing the report of the Master, the District Judge further eliminated the item of Interest on Unpaid Taxes, credited the item of Interest on Insurance Participation certificates, reduced the amount of unaccounted for, and raised the income from sales of gas to a rate of $1.00 per thousand for all gas sold (Record, pages 111-112).

Repairs to Mains, Services and Meters.

In the actual cost of distribution there was included the sum of $11,077.65 for repairs to gas mains, services and meters (Exhibit 64, Record, p. 1569; Orig. p. 2496). This item was not varied by the Master or by the Court.

The appellant Newton contends that there should be deducted from the actual cost $4,962.54, or 1.4 cents per thousand cubic feet, for the reason that the actual cost in 1919 exceeded by that much the *average* for the years from 1914 to 1918. Obviously this argument disregards the increase in cost of materials and labor during that period (Exhibits 58, 60 and 61, Record, p. 1567; Orig. pp. 2489, 2492, 2493), and would place the service to the consumers upon a theoretical basis rather than upon the basis of actual conditions as they exist.

Uncollectible Bills.

In Complainant's Exhibit 64 (Record, p. 1569; Orig. p. 2496) there was included the sum of $1,349.02 for uncollectible bills which the Master included in his allowances (Finding No. 28, page 40) and which the Court did not disturb. This item is challenged by the appellants (Appellant Newton's Brief, page 55; Appellant Wallace's Brief, page 97).

In Defendants' Exhibit A-12 (Record, p. 1761; Orig. p. 2811) prepared by defendants' accountant Cohen, entitled "Gas Operating Revenues and Revenue Deductions", 1909-1913, 1914-1919, there is included, for each year, under the title "Operating Revenue Deductions" the item of uncollectible

bills. Defendants' accountant assumed to make various adjustments conformably to the contentions of the defendants, as will be noted by the several items with which he attempts to surcharge the complainant. Nevertheless, he treated uncollectible bills as an "Operating Revenue Deduction" and not as a charge against Profit and Loss.

Uncollectible bills are classified in the category of operating expenses in the Uniform System of Accounts prescribed by the Public Service Commission (Exhibit 49, Record, p. 1481; Orig. p. 2407; Account G-870, p. 1536).

Every recognized accounting procedure for ascertaining net income sanctions the inclusion of bad debts in operating expenses, and the income tax laws invariably provide for it. The deposit which may be exacted in accordance with Section 63 of the New York Transportation Corporations Law does not provide for a sufficient protection to a gas company, as most of the uncollectible bills are due to consumption in excess of deposits collected.

Interest on Consumers' Deposits.

Included in the expenses set forth in Complainant's Exhibit 64 (Record, page 1569; Orig. p. 2496), is an item for interest on consumers' deposits, amounting to $1,621.10. This item was allowed by the Master (Finding No. 28, Record, page 40).

The payment of this interest is a requirement imposed upon the complainant by the New York Transportation Corporations Law, Section 63. These deposits are not advance payments for gas.

The paring of operating costs should not be extended by the Court to payments required by law. If these payments of interest are not proper operating charges, then the Master and the Court should have eliminated from miscellaneous operating revenue the interest received on bank balances and other items of interest (Exhibit 64, Record, p. 1572; Orig. pp. 2498, 2499).

Deductions made by the Master and the Court Below from the Complainant's Actual Operating Costs resulting in the Allowance of an insufficient amount for Operating Expenses.

If any revision of the Distribution and Other General Expenses of the complainant as found by the Court were at all warranted, the revision should be in favor of the complainant, for it should be borne in mind that both the Master and the Court made deductions from the actual expenses of operation, which are justifiable only as a measure of rigorous elimination of items susceptible of real controversy.

Defensive Emergency Service—Rate Proceeding Expenses.

The Master eliminated altogether the defensive emergency service outlay of $747.46, amounting to 0.22 cents per thousand cubic feet of gas sold, and the whole of the item of $15,518.73, amounting to 4.62 cents per thousand cubic feet sold, covering the services of accountants and engineers paid for in 1919 in connection with the present rate case (Record, page 52). These deducted items amounted to substantially 5 cents per thousand cubic feet and resulted in a finding that only 27 cents per thou-

sand cubic feet of gas should be allowed on account of what is known as "cost to distribute", as compared with the 32 cents actually expended in 1919, and the sum of 39.82 cents being expended in May, 1920, and thereafter (Exhibit 90).

The propriety of the inclusion in operating expenses, and of the allowance in a computation of the cost of service for which compensation should be made through adequate rates of (*a*) unavoidable charges on account of the expenses of the suit, and (*b*) highly necessary expenditures on account of defensive emergency service to meet exigencies, has been discussed in principle by counsel for this appellee in their Brief on The Facts in the case of the *Consolidated Gas Company* v. *Newton* (Docket No. 257, Brief, pages 124, 126-129), and we shall not here reiterate the discussion.

Upon final hearing of this case, the Court below approved the findings of the Master which made the deductions to which we have referred, and, in *addition*, the Court further pared the operating expenses and increased the income. The Court credited the expenses with income from investments made by the complainants in insurance participation certificates and deducted from the expenses interest accrued on unpaid taxes—both insignificant items but for the rule or principle. The Court also reduced the "unaccounted for" gas, thereby reducing the cost of gas per thousand cubic feet sold (discussed under Point VI, pp. 76 *et seq.* of this Brief), and increased the rate by which the income from sales of gas to the municipality at the statutory rate of 75 cents per thousand should be calculated.

The appellee has not filed any assignment of error, but brings these deductions to this Court's attention to indicate the attitude of the Court below in resolving really doubtful questions in the favor of the defendants below.

Interest on Unpaid Taxes.

The taxes in question upon which interest was accrued in the expense account of the complainant were actually levied by the taxing authorities of the State. The Attorney-General was not willing at the trial to bind the State not to collect these taxes. Under the circumstances, until the taxes are legally cancelled, the interest on them during the period of contest must be provided for and becomes a proper operating expense.

Income from Insurance Participation

The Court below said (Record, page 112) that

> "Whether or not the amount of income from insurance participation should be charged as an expense [credited against expenses] is a debatable question and for the purpose solely of this decision, I resolve the doubt in favor of the defendants."

It is respectfully submitted that the income from the fire insurance participation certificates should not be credited against the company's expenses for making and distributing gas. These certificates represented an investment made by the complainant in an insurance fund and are no different from any other investment which the complainant might make. If the income is credited to operating expenses, the investment itself should have been added to capital account, but it was not so treated by the Master or by the Court.

Loss Due to Selling Gas to the City of New York at the Statutory Rate of 75 Cents.

The Court below held that, in determining whether the statutory rate of one dollar to private consumers was confiscatory, the loss resulting to the complainant from the sale of gas to the City of New York at the rate prescribed by Chapter 736 of the Laws of 1905, of 75 cents per thousand, should not be considered. This view is contrary to the ruling by Judge Hand in *Consolidated Gas Co.* v. *Newton* (267 Fed. 231), by Judge Hough in *Kings County Lighting Co.* v. *Niron* (268 Fed. Rep. 243), and by Ex-Justice Hughes in *Brooklyn Borough Gas Co.* v. *Public Service Commission* (17 N. Y. State Dept. Repts. 81).

Of the total of 336,241,100 cubic feet of gas sold by the New York and Queens Gas Company during the year 1919, 1,554,000 cubic feet were sold to the City of New York (Exhibit 65, Record, p. 1574; Orig. p. 2502), or less than one-third of one per cent. of the total. The effect of the sale of the gas to the City of New York at the lower statutory rate was to reduce the total income by .49 cents per thousand cubic feet of gas sold.

In the prior suit of the *Consolidated Gas Company* (212 U. S. 19), both the eighty-cent rate for general consumers and the seventy-five cent rate for the municipality were attacked by the company. The Supreme Court (212 U. S. 19, 54) refused to consider separately the seventy-five cent rate or to annul that rate because seventy-five cents would be a confiscatory rate if applied generally. Separately considered, the seventy-five cent rate was confiscatory, but the test of the confisca-

ory effects of the eighty-cent rate was based by he Court upon the combined revenues of all gas old as contrasted with the combined expenses of naking and selling all of the gas sold, and upon he return on all of the property.

The same view was adopted and acted upon by ex-Justice Hughes as referee in the *Brooklyn Borough Gas Company* (17 N. Y. State Dept. Reports, 14), where the gas sold to the City amounted to our per cent. of the company's total sales. The listinguished referee found the eighty-cent rate and ninety-five cent rate both unremunerative, but nevertheless, upheld the seventy-five cent rate for as furnished to the municipality. He tested the ighty cent rate and the ninety-five cent rate by omparing the company's total revenues, including hat from gas sold to the City, with the company's otal expenses, and figured the return on the whole nvestment. While sustaining the complaint as o the rate applicable to private consumers, he dismissed it as to the rate applicable to the municipal ervice, basing his decision upon the authority of *Willcox* vs. *Consolidated Gas Company*, 212 U. S. 9, 54, and *Northern Pacific Railway Company* vs. *North Dakota*, 236 U. S. 585, 601 (17 State Dep. Rep. 114).

II.

The contingency reserve set up on the appellee's books in 1915, 1916 and 1917, is no justification for the complainant to make and distribute gas without adequate compensation for the service, or for the confiscation of the appellee's property.

Certain general phases of this question are discussed by counsel for the appellee in the appellee's brief on the facts in the case of the *Consolidated Gas Co. of New York* vs. *Newton*, Docket No. 257, at pages 461 to 470. Under this point, counsel for the appellee will confine their argument to specific statements made in the appellant's briefs in this case (Appellant Newton's Brief, Point III, pages 33-40).

During three years only the appellee set aside out of the net income or surplus distributable by it after paying the bare operating expenses, and not by way of a charge against operating expenses (See Deft.'s Exs. A-12 and 13 from which it appears that the amounts were not included in "operating revenue deductions") the following sums:

1915	$11,970.52
1916	12,615.51
1917	14,308.81
Total	$38,894.84

which it credited to a reserve account entitled "Contingency" (Defts.' Ex. A-16; Record, page

1761; Orig., page 2815). In 1915 it also credited to this account, and transferred from an account, which in accordance with the Commission's nomenclature, was entitled "Accrued Amortization of Capital", the sum of $62,254.82. At the end of the year 1918 the total credits to the account "Contingency" were, therefore, $101,149.66. No further credits have been made to the account since then either during the year 1919 or 1920 (Defts.' Ex. A-16, Record, page 1761, Orig., page 2815).

It is contended by the appellants (Appellant Newton's Brief, Point III, pages 33-40) that the "respondent has accumulated a *fund* amounting to $101,149.66 as a contingency reserve. The statute should not be declared confiscatory until this fund is exhausted".

There is not a scrap of evidence to show that this reserve is in the form of a "fund". If it were, the fund could be identified. The defendants themselves have proved that no such reserve exists in the form of a "fund". On December 31, 1919, according to the transcript from the balance sheet of the complainant put in evidence by the defendants (Defts.' Ex. A-9), the complainant had on hand $41,637.88 in cash, which was nearly three times as much as it had on hand on the corresponding days in the two prior years, but it also had bills payable amounting to $490,000, and accounts payable amounting to $60,270.64, the largest in its history and several times more than it had on corresponding days in a number of previous years. The complainant was "head over heels" in debt. Of course, the complainant had and has no "fund" available; the credit to the reserve is merely a book

figure and cannot be identified with any particular asset.

Although the resolution adopted by the appellee's Board of Directors on November 16, 1915 (Record, page 719), might justify the inference that the amount of the credit to the reserve should be included in operating expenses, in fact, as appears from defendants' exhibits, no part of the credits to this reserve during 1915, 1916 and 1917, was included in the calculation of operating expenses (Exs. A-12 and A-13, Record, page 1761; Orig., pages 2811, 2812).

The direct credits to the contingency reserve for the years 1915, 1916 and 1917 amounted to $38,891.84, which, added to the balance transferred from the accrued amortization reserve to this reserve, made the total credit $101,119.66. During the year 1919, the Master found, after making various eliminations for the purposes of the rate case only, the deficit below a reasonable return on the minimum actual investment of the appellee was $141,544.94 (Record, page 44), which included an operating loss of $9,074.70. According to the defendants' exhibits and the testimony of their accountant Cohen (Record, pages 1155-1156), the appellee's net profits for 1918 were $33,350.56, which obviously was at least $100,000 less than a fair return even upon the minimum actual investment as found by the Master. Thus, even if the principle contended for by the appellants had any merit, the reserve was wiped out before the advent of the test period adopted by the Court and no vestige was left by the end of 1919 when the appellee was facing operating costs higher than those of 1919.

An altogether unjustifiable and strained construction is sought by the appellants to be placed upon the resolution authorizing the creation of the Contingency reserve (Record, page 719). This reserve was "for the purpose of providing for contingencies or casualties such as those caused by fire, flood, earthquake, insurrection or riot, *or any other hazards*". Counsel for the appellant Newton contends that the phrase "any other hazards" should be given such an interpretation as would make it embrace the operating losses which have been suffered by this appellee due to no other cause than the arbitrary limitation of the rate to be charged for the service and the resulting disparity between the income from such a rate and the operating costs and a fair return upon the property. Under the rule of *ejusdem generis*, the phrase "any other hazards" may not be interpreted to describe things not of the same kind as the things specifically enumerated. Can it be said, therefore, that the arbitrary rate limitation is a contingency or casualty like fire, flood, earthquake, insurrection or riot? Is the imposition of an arbitrary rate limitation upon a public utility a "hazard" in any sense? If the doctrine contended for by the appellants were sustained, it would mean that, instead of the business of a public utility being affected with a *public interest*, it would be subjected to a *confiscation hazard*.

It is contended by the appellants (Appellant Newton's Brief, page 39) that the appellee should "not thus enrich itself at the expense of *the* consumers. The only burden which the consumers must bear is to see to it that they pay a rate which will give the company a fair return", etc. In view

of the powers vested in the Public Service Commission since 1907 to regulate the rates of the complainant, and the reserve power in the legislature to do likewise, and the statutory prohibition against the charging of anything more than a reasonable rate, it can not be assumed that the complainant has earned, during the years when it set aside, out of distributable net income, the credits to the contingency reserve, anything more than a reasonable return, or that it has charged unreasonable rates (*Municipal Gas Co. vs. Public Service Commission*, 225 N. Y. 89, 98). If it be the obligation of the consumers, as the appellant Newton contends, to pay a rate which would give the company a fair return, what justification is there for the *present-day* consumers refusing to pay a rate which will yield a fair return simply because *past-day* consumers *may* have paid a rate which yielded more than a fair return? The books of account of the complainant placed in evidence, and the tabulations made therefrom by the defendants, show that the complainant, the New York and Queens Gas Company, has never paid any dividend. Even if the former-day consumers had discharged their obligation to pay a fair rate, certainly that does not entitle present-day consumers to enjoy free or inadequately compensated service.

It is suggested by the appellants that the "contingent fund" (which, as a *fund*, does not exist) could have been capitalized by the issuance of securities by the complainant and the proceeds utilized to make up the operating losses. Of course, the proceeds would have been too soon exhausted to stem the tide of accumulating losses, but the suggestion is so amateurish a financial scheme as

to be humorous. A company whose property, including this "contingent fund", has been confiscated by the effect of a rate limitation, which has been unable to pay its fixed charges except by borrowing them, and which does not earn enough to pay the interest on its outstanding bonds, is, under the financial scheme of the appellants, to issue new securities and create additional fixed charges which it cannot meet under the statutory rate. Unless the complainant is expected to practice the grossest fraud upon those who would be enticed into making the investment in such new securities, who would put up the money for such an investment?

Finally, the appellants' brief (Appellant Newton's brief, pages 39-40) says that, without assuming "that the fair value of the company's property and the rate of return it was entitled to enjoy was correctly set forth by the learned judge below, it will be readily seen that this fund [contingency reserve] was large enough to carry the company over a period of several years without changing the statutory rate and without any income for making and selling gas for such period". By what arithmetical process such a result is obtained is, we respectfully submit, beyond intelligent comprehension.

III.

The Period Proper for a Test.

The same point is made in this case as in the *Consolidated Gas Company* case (No. 257 submitted herewith) that the period during which the rate was shown to have been confiscatory was insufficient, and that the appellee, over a period of years, derived a fair return upon its investment on the average.

The District Judge found himself "in full accord" with the views of Judge Cardozo of the New York Court of Appeals, and of Judges Hand and Hough in the cases submitted herewith (Record, page 110) and sustained the Master.

As to the general point involved here, a full discussion will be found under Point VII of Appellee's General Brief in the *Consolidated Gas Company* case, No. 257, and repetition here is unnecessary.

We may add, however, that the proofs showed, and the Special Master found, the complete operating costs of the Appellee for the years 1918, showed, and the Special Master found, the complete operating costs of the Appellee for the years 1918, 1919, and for the first five months of the year 1920. Surely confiscation for more than two full years is sufficient to call for judicial relief.

Rather elaborate tables have been made up by the appellants showing their claims as to the returns earned by the complainant during the years 1906 to 1919, upon the basis of which they contend

that the appellee has earned on the average a fair return (*e. g.*, Appellant Newton's Brief, Point I, pages 8-13; Point VII, pages 88-98).

Discussion as to the average return over a number of years is academic, since the current operating expenses of the complainant and the compensation to be made to the investors for the use of the complainant's property, cannot be defrayed by any calculation of averages for a prior period. The complainant cannot be deemed to have earned more than a fair return during the prior years in view of the power vested in the Public Service Commission, and also reserved in the Legislature, and of the statutory prohibition against charging more than a reasonable rate (*Municipal Gas Co. v. Public Service Commission*, 225 N. Y. 89, 98).

Moreover, the process used by the appellants to compute the value of the property for the years 1906 to 1919 was soundly rejected by the Master and by the Court below. It is stated in Appellant Newton's brief, page 10, that "Mr. Hine showed that the *fair value* of respondent's property does not exceed the following average amounts for these years." In point of fact, Mr. Hine did not attempt to testify to the "fair value" of the complainant's property and none of his tables are labelled "fair value". His Ex. 109 (which is referred to in Appellant Wallace's brief, page 10, as the basis of their claims as to the fair value of the complainant's property) bears the caption "Average Fixed Capital, Including Engineering, 1904-1919 (Exclusive of Land)" (Record, page 1877, Original, page 3059). Hine testified merely to calculations of original cost and "accrued theoretical depreciation", and the latter he deducted from the original cost. The absurd

values for the years 1906 to 1918 are arrived at by the appellants in the same manner as was their value for 1919, that is, by the deduction of enormous sums for "accrued theoretical depreciation", by either starvation or no allowances for working capital, organization, interest, taxes, engineering, etc., and by a failure to make any allowance whatever for franchises or going value; or, in other words, by a process of decimation. We do not believe that a basis such as this will commend itself to this Court any more than it has to the various judges in the Second Circuit before whom similar contentions were urged by the defendant public authorities in the various rate cases.

IV.

No error was committed by the Special Master and District Court in admitting the books of account.

The methods of proof as to operating expenses, pursued in the present case, were thus described by the Special Master:

> "The books of account, vouchers, manufacturing records, works reports, and the like, of the complainant company were placed at the disposal of the defendants, more than six months in advance of the beginning of the trial before me, along with copies of the principal statistical exhibits which the complainant proposed to offer in evidence upon the trial, and were carefully and thoroughly examined and analyzed by counsel for the defendants, their accountants and engineers" (Record, p. 48).

> "For the purpose of proving the quantity and cost of materials, labor and the like, as well as the revenues and expenses of its gas business, the complainant company presented to me, as previously to the accountants and experts of the defendants, all of its invoices and vouchers for coal, oil and other materials and supplies purchased, together with its various payrolls, works reports, records of manufacture, office reports, and the like, together with its books of account in which the items of expenditure and revenue shown by these underlying records had been entered. All of this data covered the year 1919 and the first five months of the year 1920. To the invoices for coal, oil and other materials, were attached the certificates evidencing the receipt of the quantities indicated, and to the oil invoices were also attached the certificates of the New York Produce Exchange inspectors attesting the quantity and quality of the oil delivered. The

public accountants employed by the complainant had checked these vouchers and records to the books and certified to the accuracy of both. There was also submitted to me the sworn testimony of qualified witnesses as to the actual cost of oil, coal and other materials from 1906 down to the present time, including the years 1919 and 1920, and the sworn testimony of experienced operating engineers as to the quantities of coal, oil and other materials, and of the labor, actually required for the manufacture of gas and the wages necessarily paid to labor during this period, including 1919 and the first five months of 1920.

"The defendants also offered in evidence data showing the operating results, the unit quantities of materials used, the unit costs thereof, and other information as to the revenues and expenses of the complainant company during the years from 1906 to 1920. Various of the underlying records of 1918 and prior years were also produced in Court at the instance of the defendants, and various of the entries in the books of the complainant and its predecessor company were placed in evidence by the defendants" (Record, p. 47).

The brief of the Attorney-General (page 106) contains a specification of error in the admission of the books of account on the ground that "the books were incorrectly kept and that the underlying data on which the books were based were incorrect and that there existed errors in the underlying data which had found their way into the books". The point is not argued and the particular errors in the underlying data claimed to have found their way into the books of account are not specified. It would seem that the Attorney-General places no great reliance upon this assignment of error. As both the Master and the District Court have found that the books were correctly kept and correctly reflect the trans-

actions of the company, it seems perhaps unnecessary to speculate as to what "inaccuracies" might be deemed referred to by the Attorney-General's innuendo.

The brief of the Corporation Counsel of the City of New York submitted on behalf of the appellant Wallace, makes some point of the admission of the books of account (page 182), but he may find excuse for the inaccuracies of his statements as to the books, in the fact that the Corporation Counsel took no part in the trial before the Special Master, the defendant District Attorney being represented by other outside counsel who took little or no part in the proceedings. He was not represented by the Corporation Counsel until after the appeal had been taken to this Court.

Thus on page 187 the point is made that the books are not books of original entry and that not one witness was called to prove the underlying data on which the entries in the books rest. Had the writer of this brief read the record with sufficient care he would have found that the correctness of the entries in the books were proved: (1) by the Vice-President, who is in general charge of the system and has been for many years (page 180); (2) by the Secretary of the company, who is in direct charge of all the books of account (page 262 *et seq.*), and who testified that there is but one set of books (page 267), and that they are correctly kept (page 268); (3) by the bookkeeper, who since May 18, 1918, has made all entries in the general books of account (page 287); (4) by the introduction of all the vouchers underlying the books of account for 1919 (page 271) and for 1920 (page 616); (5) by the Superintendent of

the works (page 569), who is on the job twenty-four hours a day (page 571), and who produced in court all of the daily records of manufacture for both years (page 576), and who was cross-examined at great length upon the operations at the works and the method of recording the transaction of the manufacturing department (pages 576-609, inclusive); and also by the witness Teele, an expert accountant of high standing (page 220 *et seq.*), who testified to a complete and thorough examination of the books of account and all of the underlying data from which he made tabulations showing the results of the company's operations. The attitude of the defendants upon the trial is illustrated by the remark of the Master on page 619, provoked by the continual objection to all testimony of any kind relating to the transactions of the company:

> "The Master: When I take the pay rolls you object because there should be some man to swear to it, and when we have a man to swear to it, you say I should take the pay rolls."

Not only were the records of manufacture underlying the books of account produced in court but as many of them as were desired were received in evidence on behalf of the defendants (defendants' exhibits C to H, record, page 1729 *et seq.*).

It would seem that the only further proof in substantiation of the books of account that might have been offered would have been to bring the gas plant into court and to have it operated in the presence of the Master.

The District Judge who reviewed the findings of the Master found sound ground for resting his approval of the admission of the books of account

(Record, page 110) upon the opinions of Judge Hand in the *Consolidated Gas Company* case (No. 257) and of Judge Hough in the *Kings County Lighting Company* case (No. 295, submitted contemporaneously herewith). In the Appellee's Brief on the Facts in the *Consolidated Gas Company* case argued contemporaneously herewith, the admissibility of the books of account of the Consolidated Gas Company is fully dealt with (see Points IV and V thereof; pages 155 to 238), and we respectfully refer to that discussion.

V.

The appellants' claim of a deficiency in candle power is without merit and is not supported by the evidence.

The answer of the defendant, Public Service Commission contains a separate defense (page 16), alleging that the complainant has "persistently, continuously, knowingly and wilfully failed to abide by and comply with the foregoing provisions of Chapter 125 of the Laws of 1906, in that it has persistently, continuously, knowingly and wilfully failed during the years of 1918 to date and prior thereto, to furnish gas having an illuminating power of not less than twenty-two sperm candles", etc.; as a consequence of which the complainant does not come into a court of equity with clean hands, and should be dismissed.

Under Point X, p. 289 *et seq.* of the Appellee's Brief upon the Facts, in *Newton* v. *Consolidated Gas Company*, No. 257, submitted simultaneously herewith, we have discussed at length the merits of such a plea in an equity action involving rates for gas. It is not necessary to repeat at length in this brief what has been there said. It is sufficient to point out that in not one of the many gas cases recently tried in the City of New York in the Federal Courts, nor in any case in any court of last resort in the country, has it been held that a public utility corporation must suffer the unlimited confiscation of its property through inadequate rates, because it may have at isolated intervals in the past occasionally fallen slightly below

the standard quality fixed by law for the commodity furnished by it.

But in this case the defendants failed even more dismally than they failed in the *Consolidated Gas Company* case in their efforts to prove the failure on the part of the appellee to conform to the statutory standard of candle power. The statement of the complainant's expert, Mr. Woods, that the making of 23½ candle power gas at the works would ensure on the average 22 candle power on the district (page 456) was not disputed, nor was it disputed that the company habitually made gas of 23½ or greater candle power at its works. Indeed the statistics of the company offered in evidence by the defendants themselves amply proved that fact.

The test sheets showing candle power tests made by employes of the City of New York for a period of four years were tabulated and placed in evidence (page 1796), and show substantial compliance by the complainant with the requirement of the statute. During the year 1919 the period for which complete returns were in evidence, and the period used by the Special Master as the basis of his findings, there were but two months when the average for the month showed below 22, and on one occasion the deficiency was .14 of a candle power (page 1833) and on the other .4 of a candle power (Record, page 1841).

The number of "violations", that is, the number of times when the City tester in his judgment concluded that the candle power of the gas he was then examining was slightly less than 22, is immaterial. A large part of the so-called violations referred to by the defendants represent only slight fluctuations of a few hundredths of a candle power below 22.

At such times as the candle power appears to have gone substantially below 22, the record is ample in explanation in the fact that the mains of the company are for many miles exposed in salt meadows to the action of cold weather and to the action of severe winter weather encountered during the period in question.

Not only are the mains of the company exposed for a number of miles upon the salt meadows of Long Island (page 623), but there are also many points in the district in which, owing to change of grade of railroads in the streets under the jurisdiction of defendant Public Service Commission, the mains are continuously exposed to the effect of cold air, and there is even such an exposed main within 100 feet of the testing station of the city, so that the gas tested may frequently come from a main which has been directly exposed to the effect of the most severe winter weather (page 624).

The effect of cold upon the candle power of gas was admitted by the city tester, who also admitted that candle power once lost from the gas through the effect of cold is never recovered (page 1151).

The reading of the cross-examination of the city's tester discloses the utterly unreliable method of test used by the city, which falls far short of compliance with the standard fixed by the law. Not only are there considerable variations due to the personal equation, making necessary the taking of ten readings of candle power in order to secure a fair average and to attempt to eliminate the imperfections of the candle and other inaccuracies of the method used (page 1139), but after the so-called "observed candle power" has been ascertained

elaborate mathematical calculations must be carried out in order to obtain a figure called "corrected candle power" (pages 1140-1141).

The city tester appears to be entirely satisfied with one test per day if he succeeds in obtaining a reading showing the corrected candle power below 22; but where his test shows candle power substantially in excess of 22 he frequently makes two and even three tests in the hope of securing a result which he may report as a violation. If this hope is realized and he finds one test well above 22 and another below it, the average of the two or three tests made is reported as candle power for that day (pages 1143-1147 inclusive). But even with the unfair and unreliable method employed by the city testers, the defendants were unable to prove any substantial or continued violations of the statute; and the proof does not show "persistent, continuous, knowing and wilful" failure of the company, as set up in the answer of the defendant Public Service Commission (page 16).

On the contrary the reports of the City tester of the candle power of appellee's gas show that during 1919, the year prior to the trial, the average candle power was 22.59, and during the first five months of 1920 was 22.72 (pages 1833 *et seq.*). And even over a period of more than four years, when severest winter weather was encountered, the total average candle power found by the City was 22.12. The appellants disproved their contentions by their own evidence, and apparently place no reliance upon their assignment of error relating thereto.

VI.

There is no evidence justifying a lower percentage of unaccounted-for gas than the conservative figure of 10% found by the District Court.

In order to indicate the fallacious nature of the claims made by the Attorney-General in his brief on the subject of unaccounted-for gas (pages 52, 53 and 54), it will be necessary to describe in some detail what unaccounted for gas is and how it is ascertained.

A gas company like the present appellee knows from day to day and for a period of months and years, exactly how much gas is made and sent out from its stations; this is ascertained through its large recording meters at the manufacturing plants. It likewise knows, through the reports of its meter readers of the readings of consumers' meters, how much gas is delivered to its consumers for which it may charge the statutory rate. It also knows by like means how much gas it uses in its own works, offices and shops. The sum of the gas recorded in the consumers' meters and the cubic feet of gas used by the company constitutes gas accounted for; this amount is always less than the amount of gas manufactured and sent out, and the difference is unaccounted-for gas.

This difference is due, as testified by the appellee's expert, Mr. Woods, a gas engineer of many years of experience (page 406 *et seq.*), to slow consumers' meters, condensation and leaks in the mains and services, differences in temperature at

which the gas is registered at the consumers' meters, and is a greater percentage of the gas made in a suburban territory built up like the territory of the present appellee as compared with a more congested metropolitan territory (page 407). Thus it was testified that a leakage or loss of gas through these various causes, amounting to 10% of the amount made and sent out, would be a very reasonable amount of unaccounted-for gas for a company like the appellee. Indeed he said upon cross-examination (page 410) that anything from 9 to 12 or 13% would be a fair operating condition.

The appellants do not dispute that some amount of unaccounted-for gas is to be encountered in all gas companies, but undertake by a fallacious table to state unaccounted-for gas, not in percentages, but in terms of cents per thousand cubic feet, a thing which we shall demonstrate is meaningless.

Inasmuch as there are less cubic feet sold than are actually made, the cost per thousand cubic feet *sold* will always be greater than the cost per thousand cubic feet *manufactured*. This may be seen by reference to complainant's exhibit 64 (pages 1569 and 1570). The total quantity of gas made, as appears on page 1570, was 380,086,000 cubic feet. The total operating cost was $241,176.84, resulting in a figure of 63.45 cents per thousand cubic feet made. Of this quantity 1,933,300 cubic feet were used by the appellee and 336,241,400 cubic feet were sold to its consumers, as disclosed by the reading of consumers' meters. The difference between the sum of the latter two figures and the first figure given above (after giving

consideration to a small variation in the gas on hand in the storage holders) is 41,915,300 cubic feet, which represents the gas lost or unaccounted for, and is 11.03% of the total quantity made.

Stating it in another way, it may be said that it was necessary in the year 1919 to manufacture 380,086,000 cubic feet of gas in order to deliver to paying consumers 336,241,400 cubic feet; using this last amount as a divisor of the operating expenses shows a cost per thousand cubic feet *sold* of 71.73 cents (page 1571). The difference between this figure and 63.45 cents, the cost per thousand made, is 8.28 cents per thousand. It is not correct, however, to say that unaccounted-for gas cost 8.28 cents per thousand cubic feet, for in this figure also is found the gas used by the company.

Nor does a comparison of this figure, derived by subtracting the cost per thousand cubic feet sold from the cost per thousand made, in other years, offer any basis of comparison, for with the varying operating cost due to changing price levels from year to year the quantity of unaccounted for gas is not disclosed by the difference in price between the cost per thousand sold and the cost per thousand made. It may be illustrated by a glance at defendants' exhibit A13, referred to in the brief of the Attorney-General. This table was prepared by a witness for the defendant Public Service Commission, who said he had compiled it from the company's books and from the reports of the company to the Public Service Commission made annually in accordance with the requirements of law (page 1164). The cross-examination, however, dis-

closes that it is largely a computation made by the witness. A comparison of the various figures from 1909 to 1919, comparing the total production expense in cents per thousand cubic feet with the gas unaccounted-for in the line immediately above it, would show that there is no relationship whatever to be deduced from the figures.

A low quantity of unaccounted-for gas in a year when prices were high would show a comparatively high cost per thousand, while a very large amount of unaccounted-for gas in a year when prices were comparatively low would show a low cost per thousand. This is illustrated by the following table in which we have set up opposite the table printed on page 53 of the appellants' brief, the actual percentage of unaccounted-for appearing in each of the years for which the so called cost of unaccounted-for is stated:

	Difference between cost per M cu. ft. made and sold.	Actual percentage.
1909	5.67	15.23%
1910	6.62	18.88%
1911	6.03	17.50%
1912	6.25	18.49%
1913	6.79	18.13%
1914	5.97	15.13%
1915	6.32	16.37%
1916	4.40	10.74%
1917	4.11	7.78%
1918	5.27	8.07%
1919	8.27	11.02%

From the foregoing we see that while the apparent cost of unaccounted for gas did not fluctuate materially throughout the period, the actual percentage of unaccounted varies greatly, and while

comparatively low in 1919, nevertheless results in a comparatively high cost per thousand because of the higher price level and consequent increase in operating costs of that year.

In view of the foregoing percentages of unaccounted for, taken from the same sources as defendants' exhibit A13, what becomes of the appellants' claim that unaccounted for gas should be stated as an average over a period of years, a theory which they succeeded in inducing Judge Hand in the *Consolidated Gas Company* case to adopt? The average unaccounted for for the ten years stated amounts to about 14%. It appears as a generally diminishing percentage down to 1918, in which a winter of extraordinary severity was encountered. In 1919 and 1920 the Douglaston extension, comprising more than six miles of transmission mains, constructed pursuant to the mandate of the defendant Public Service Commission, was in operation, through which gas at high pressure is transmitted to the sparsely settled community of Douglaston. Under the conditions there existing as well as under the severe winter weather conditions in that year, the percentage of unaccounted gas necessarily increased (pages 491-494, etc.).

In view of these facts the Master was fully justified in accepting as he did the actual figure of 11.03% unaccounted for gas for the year 1919 as typical of the cost of that period, for unaccounted for gas is a *fact* and not a *theory* and should be taken into consideration in connection with all the circumstances influencing the cost of gas at a given time; and what it may have been under other con-

ditions of coal, oil, weather, etc., in previous years, or what it may have averaged over a period of varying conditions, can have no bearing upon present unaccounted for gas.

In like manner the court is well within the margin of safety when, in order to take all the doubtful questions against the company, he accepts the amount of 10% testified to by the witness Woods as constituting a very reasonable amount of unaccounted for gas for a company such as the appellee. We have already pointed out that no one disputed the testimony of this witness nor attempted to show that the amount of unaccounted for gas either was not the percentage of 11.03 shown by the record or was an excessive percentage. All that is sought by the appellants is to whittle away the legitimate operating expenses proven by the appellee by an ingenious but fallacious attempt to translate unaccounted for gas into cents per thousand cubic feet. This as we have shown presents no reliable basis for comparison.

It is significant in this connection to note that the appellants, while they contended for an average of a long period of years in the *Consolidated Gas Company* case, carefully refrain here from calling attention to the *percentage* of unaccounted for gas prior to the years 1918 and 1917, the only two years in the table printed above where the unaccounted for fell below 10%. If their contentions in the *Consolidated Gas Company* case are correct, the unaccounted for to be taken in this case should not be less than 14%. Indeed, in a company similarly situated Judge Hough accepted 15% as reasonable (see his opinion in *Kings County Lighting Co.* v. *Newton*, No. 295, submitted herewith).

VII.

The Proper Rate of Return.

As in the *Consolidated Gas Company* case, the Master found eight per cent. per annum to be a reasonable and proper rate of return upon the property used in the appellee's business (Record, page 44). This finding is based upon the same proof that was submitted in the *Consolidated* case (pages 880 to 910), and as it is fully covered in the Appellee's General Brief in that case (Docket No. 257, General Brief for Appellee, Point Sixth, page 23); further discussion need not be undertaken here.

VIII.

The Appellee should be allowed a fair return on the present value of all its used and useful property; the minimum value of tangible property, found by the District Court, is far less than any sum justified by the law or the evidence.

Under Point XIII, p. 344, of the Appellee's Brief on the Facts and Incidental Questions of Law, submitted contemporaneously herewith in *Consolidated Gas Company* v. *Newton*, we have set forth at length our reasons for believing that, as the State Court of New York has held (*Municipal Gas Co.* v. *Pub. Serv. Comm.*, 113 Misc. 751), following the decisions of this Court, a gas corporation is constitutionally entitled to have its fair return computed upon the *present value of* its property at the time the rate complained of is being tested, and not by the original cost of such property. For a full discussion of the decided cases, we beg to refer here to pages 350 *et seq.* of that brief.

In the present case, as we have seen, the appellee *did prove the full present value of its property, upon undisputed evidence* (Findings Nos. 36, 40 and 41; Record, pages 42, 43).

In addition to proving the *present value of* its property, as of the time of trial, the appellee also proved:

(1) The cost to reproduce the property by applying to the *present inventory of* property the unit prices prevailing as of January 1, 1914; and

(2) In rebuttal of the defendants' claims, the appellee's actual investment in its gas properties.

This Court thus has before it all possible pertinent facts to reach and state an accurate, adequate and comprehensive figure, for the value of the appellee's property as of the time of trial. The appellee contends for a return based on "*present* value", and not on the original cost of the property.

In any event, however, and under any possible theory, the figure used by the District Court for the purpose described by him (i. e., what the defendants admit was the original cost of tangible property admittedly used and useful), was and is far too low.

As already pointed out, the District Court found the actual cost of the tangible property to be $1,130,497.08 (page 115), as to which there is no controversy. This figure is composed of the item of $280,108, representing the amount agreed by both parties to represent the actual cost of property at present in use and acquired prior to August 1, 1904; and $850,389.08, representing the cost of net additions to the property since August 1, 1904 (Master's opinion, page 54). At page 1178 of the record the defendants' witness, Hine, testified that he took the figure in complainant's exhibit 96 showing the amount expended prior to 1904 and still in use, and on page 1180 he testified that as to the additions to the property since 1904 he did not make any change in the figures of the complainant's witness. These figures being accepted by both sides as representing actual costs, there can

be no question that the sum of these figures found by the court as the minimum value of the complainant's property is correct. Were it merely necessary to justify the court's figures we believe this would be sufficient. But the appellee believes both the Master and the court erred largely on the side of prudence, and in order to demonstrate the ultra-conservative nature of the findings as to value made by each of them, we desire here to point out briefly the evidence as to present value offered by the appellee upon the trial.

Present Reproduction Cost.

The appellee submitted through Col. Miller, an expert gas manufacturer and builder of gas apparatus, a detailed inventory of all the plants and property of the appellee, together with the cost to reproduce the same as of January 1, 1920. This appraisal is printed in full at page 560 of the record. To the total of $2,907,062 there shown should be added according to this witness at least $525,000 to $550,000, representing going value (record, page 814). As to the items of this appraisal representing the tangible property, the appellants offered no testimony tending in any respect to contradict either the correctness of the inventory itself or the correctness of the unit prices applied thereto by the witness. The appellants had this inventory well in advance of the trial and for many weeks prior thereto and during the trial were engaged through their experts in examining the property and checking the inventory; their failure to challenge any item therein, as well as the use thereof by the witness Hine in computing his own tables, establishes their correctness.

As to the portion of the appraisal dealing with development expenses, cost of financing, working capital, and other so-called "intangibles", there was dispute upon the trial as to the amount, but all parties agreed that some allowance for these various items as well as for going value should be made.

The Special Master, while not basing his rate base upon reproduction cost or present value, made a finding (page 42) of the total present reproduction cost, including land of $2,100,774.90. To this sum he found various structural overheads, going value, etc., should be added in order to make a complete valuation (page 43).

The items used by the Master to get the foregoing total not having been the subject of any dispute upon the trial, it is plain that if present value is to be considered in computing the rate base, the present value of the appellee's property useful in its gas business will be far in excess of the sum found by the Master or by the court, even after the deduction of the enormous sums for accrued depreciation claimed by the appellants.

Land.

The appellee owns and uses in its manufacturing plant a tract of land containing 107,402 square feet (exhibit 112, page 1719). The appellee offered upon the trial the testimony of a highly qualified real estate expert residing in that portion of the city, who testified that on January 1, 1920, that land was worth $55,000 and would bring that sum in the market (record, page 297 *et seq.*).

The Master included as the cost of land in his finding, both as to reproduction cost and as to

actual cost, the sum of $15,153.90, made up of the figure of $19,423 for land acquired prior to August 1, 1904, and $20,630.90, the actual cost of additions to real estate since 1904 (page 56). These figures, therefore, constitute part of the figures of tangible property above referred to and are undisputed.

Exhibit 112 (page 1718), prepared at the request of the Special Master upon the basis of the average unit cost of land acquired since August 1, 1904, establishes the figure of $47,867.93 as an estimated present cost of land upon the basis of the cost of that portion of it acquired since 1904 (see record, page 1384).

The authorities requiring ascertainment and use of present value in a case such as this require the use of the present value of land even more unhesitatingly than in the case of plant and machinery. This was clearly held in the *Minnesota rate* cases (230 U. S. 351). The valuation of Mr. Halleran of $55,000 was not impeached in any respect upon the trial but on the contrary was strengthened upon cross-examination and should have been accepted by the Master as the present value of real estate, particularly when making a finding as he did of the present cost to reproduce.

The Method Used by the Master of Ascertaining Value.

As we have already pointed out, the actual cost to the company of the various items of tangible property in use on December 31, 1919, was the subject of agreement between the parties. This property, as shown in exhibit 96 (page 1605) is subdivided into two classes, (1) property on hand

August 1, 1904, which both parties agree cost and was reasonably worth as of that date $280,108, and (2) cost of additions to the property since, shown in detail on exhibit 96 and on the books of record of the company and agreed by both parties as being $850,389.08, making the total of $1,130,497.08 accepted by the court as the minimum value of the tangible property.

In addition to the foregoing items of tangible property, the appellee asked the Master to find in accordance with the evidence of the books as summarized in exhibit 96 (page 1606), $320,350 for preliminary organization and other undistributable structural costs, $500,000 for franchises and rights, and at least $500,000 for going value (record, page 814). The Master allowed as covering all of the last three items enumerated the sum of $390,380.86, which he reached as follows (page 55):

> "At the time of the merger of the Newtown and Flushing Gas Company into the New York and Queens Gas Company, the total property and assets of the former (exclusive of working capital) were carried on the books of the former at $694,678.00. Since that time, plant and equipment so acquired by the complainant on August 1, 1904, has been retired, at a book cost totalling $24,189.14. The tangible property acquired on August 1, 1904, and still in service, is agreed to have cost before August 1, 1904, and to have been worth on that date, the sum of $280,108 exclusive of franchises and rights and 'going value' and the undistributed structural items under consideration. The deduction of these two items from the book total $694,678.00 leaves only $390,380.86 as representing the book cost to the Newtown and Flushing Gas Company of the franchises and rights, the 'going value' and the undistributable structural items hereinbefore mentioned.

There is sufficient evidence to warrant my conclusion upon the present record that the item of 'franchises, good will, etc.', on the books of the complainant and its predecessors, covered, among other things, preliminary and development expenses and the various other items which Mr. Miller puts in at a total of $320,350, and also the cost of 'franchises and rights', which Mr. Miller puts in at $500,000; and I think it will be fair for me to say, for the purposes of the present case, that for all of these items just referred to, the New York and Queens Gas Company actually paid no more than their book cost to the Newtown and Flushing Gas Company and its predecessors, viz: $330,380.86, and that these elements had cost the Newtown and Flushing Gas Company and its predecessors, and were worth, on August 1, 1904, at least that sum."

The foregoing finding of the Master as to undistributable structural costs, going value and the like, is based upon the defendants' exhibit Y, page 760, showing the balance sheet of the Newtown and Flushing Gas Company, the predecessor of the appellee, just before the acquisition of its property by the appellee. This exhibit was offered by the defendants and is based upon books of account placed in evidence by the defendants. The appellants are, therefore, in no position to dispute the correctness of the figures of property shown upon the books placed in evidence by themselves. Indeed the appellants did not dispute upon the trial, nor do they dispute here, that in an enterprise of this kind actual costs are incurred for such items as organization expense, interest during construction, etc., grouped together here under the title of undistributable structural costs; nor that some allowance should be made for going value. The only real controversy upon the trial, as to valuation,

was as to the amount to be allowed for these items and for working capital, and on the subject of depreciation, which is dealt with in another section of this brief.

That the finding of the Master was very conservative may be seen by a glance at this balance sheet, the largest single item of which is for "franchises, good will, etc." It is significant, however, that no *gas plant* is shown but only real estate, mains, meters and other accessories. It is apparent, therefore, that the gas plant, which it was conceded has existed at this site since 1859, must be found in the item "franchises, good will, etc." of $469,435.61.

The statement in the brief of the appellant Attorney General (page 89), that the "appellants successfully convinced the court that this finding of the Master was erroneous", is without foundation. In his original opinion the court declined to pass upon the question of valuation at all (Record, page 113), saying that any expression of opinion going beyond the requirements of the case would be mere dictum and would amount to a little more than an individual opinion.

Upon the earnest request of the complainant, however, the court upon settlement of the final decree recognized the force in the contention that he should find that the company owned property of some value. The court, therefore, took the actual cost of tangible property concerning which there was no dispute (page 115). The court said:

> "This figure, of course, does not include various other controverted items referred to in the master's report."

Far from finding the Special Master to have committed an error in his finding on value, the District Court confirmed the Master's finding as far as he thought it necessary to do so, refusing to enter into a determination of the controverted items.

The absurd values set forth in the appellants' brief are arrived at (1) by the deduction of enormous sums for theoretical accrued depreciation (dealt with in another portion of this brief) and (2) by starvation allowances for working capital, organization, interest and taxes, etc., and a failure to make any allowance whatsoever for franchises or going value, although the testimony was undisputed on both sides that allowances for such items should be made, and the complainant offered evidence placing going value at $500,000 or more which was not controverted by any witness for the defendants.

Furthermore the error of $33,444 in the tables of the witness Hine, who is responsible for the valuations, cannot be so lightly brushed aside as is sought to be done by the appellants in their brief (page 93). This error occurred in the exhibit which is the basis for all the subsequent calculations of the witness (record, page 1332). It is carried forward into exhibits A106, A107 and numerous other exhibits depending upon the table in which the error was made (page 1333). No attempt was ever made by the witness to correct his inaccurate computations, an inaccuracy which, together with the rest of his cross-examination, thoroughly discredited the witness upon the trial, and because of these and because of the unintelligible method of making up this table, they were entirely disregarded by the Master in arriving at his finding.

The Appellee's Actual Investment in the Property.

On August 1, 1904, as found by the tables prepared and introduced by the defendants (defendants' exhibit Y) the appellee actually paid for the properties including franchises, rights and the value which attaches to a going concern, $1,250,000 in face value of its stock and bonds. Opening entries were made in its books reflecting these properties and that payment.

From and after August 1, 1904, the books correctly and fully showed the cost of all additions to appellee's property. No item of such additions has been challenged by the appellants; they proved these items and stand on them.

If then the property acquired in 1904 was fairly worth in money what was paid for it, the books correctly show the present investment of the Company in its property.

We believe that upon all the evidence, the property acquired in 1904 had cost and was then worth what was then paid for it in the par or face value of the securities turned over and that such securities were then worth at least their par or face value. This is confirmed by the testimony of Mr. Miller for the appellee and Mr. Hine for the appellants, by indications as to market quotations, by the known fact as to prices prior to 1904, and by the weight and presumption attaching to the action of the corporate trustees and by all the surrounding circumstances.

The Necessary Investment Per Thousand Cubic Feet Sold.

A still further check is provided by the testimony of the appellee's witness Miller, a gas engineer of nation-wide repute and of great experience and attainments. He testified (page 943) that the reasonable and necessary investment per thousand cubic feet of annual sales for plant and distributing systems like that of the appellee Company would be between $5.50 and $6. This was not disputed by the defendants except that one of their witnesses questioned the possibility of stating investment cost in terms per thousand cubic feet of annual sales. This witness, however, was not a gas manufacturer and has had no experience in investment matters. The Master found that $5 per thousand cubic feet of gas sold fairly represents the actual and necessary investment in the property used and needed for the manufacture and transmission and distribution of gas, and that such investment may for the purposes of this case be taken to be at least that sum (finding 35, page 41).

This figure of $5 applied to the annual sales of $336,000,000 for 1918, produces $1,680,000 as the necessary investment, a figure closely approximating the figure of $1,655,877.94 taken by the Master for the rate base in finding 34 (page 41).

The figure finds further confirmation in the action of the defendant Public Service Commission, in 1913, in valuing the Brooklyn Borough Gas Company, a company comparable to the appellee here in that it makes water gas only, at $4.85 per thousand cubic feet of annual sales (4 P. S. C.

First Dist. N. Y. 328), and this value was obtained after deducting a large amount of accrued theoretical depreciation. The company's investment was actually over $5 per thousand. Similar valuations were made in the cases of the Kings County Lighting Company and the Queens Borough Gas and Electric Company. It is obvious that these valuations relating to property erected or installed prior to 1911 are far below what such property would have cost per unit in the period of high prices prevailing in 1919 and 1920 and at the present time. Surely Colonel Miller's figure of $5.50 to $6 is a very reasonable estimate of present day prices and the figure of $5 taken by the Master is a very conservative estimate.

This matter of a standard or usual investment per thousand cubic feet of gas sales was discussed fully under Point XIV, pages 366-368 of the Appellee's Brief on the Facts, in the *Consolidated Gas Company* case (Docket No. 257), to which we here refer.

Working Capital.

The appellant, Attorney-General, in his brief, page 74, rather vaguely combines working capital, which is tangible capital, with undistributable structural items or overhead, and asserts the combination should be allowed at some indefinite figure less than $100,000. The Master adopted $135,000 as the proper allowance for working capital in the amount upon which the company was entitled to earn a return (page 56). The defendants appear to derive some comfort from the fact that the Master's report respecting this item was not affirmed by the District Court (brief, page 75). Like consolation is also afforded to the appellee on the ground that neither was the Master's report

in this respect reversed or overruled by the District Court; the fact is that the District Court did not pass upon the question of working capital, deeming it unnecessary to do so for the purposes of this case. His sole finding upon property was the undisputed figure of the actual cost of the tangible property.

Working capital may be defined as "the total floating or mobile capital required in addition to the fixed capital". It is found in the form of cash requirements, or in the form of material and supplies. Money has to be put into things which are not reflected in the fixed capital account and a reservoir of cash has to be kept on hand to handle current transactions promptly and economically (Record, page 566). Colonel Miller, an expert gas manufacturer and an appraiser of gas properties, estimated the complainant's working capital requirements at $165,000, made up as follows (Record, page 567):

Materials and supplies.....	$60,000
Cash	50,000
Accounts Receivable	35,000
Gas furnished but not yet billed.	20,000
	$165,000

The defendants claim that no more than $70,000 working capital for the year 1919 should be allowed (Defendants' Exhibit A112, page 1880; Testimony of Maltbie, Record, pages 1214 *et seq.*; cross-examination, pages 1261 *et seq.*, inclusive).

The Master concluded from all the evidence that $135,000 was a reasonable amount to be allowed for working capital and included the same in the total sum upon which the complainant is entitled to

earn a fair return (Finding No. 33; Master's Opinion, pages 41, 55-56).

The appellee believes that it is entitled to the allowance of the full amount of $165,000 as testified to by Colonel Miller, who said upon cross-examination that in his opinion it was a very important amount for the company to have on hand if it was to operate economically and pay its bills promptly, taking advantage of cash discount (Record, page 856). When asked if 15 cents a thousand cubic feet of annual sales would not be sufficient, he said: "No living company could operate on that." Even the witness for the defendants, Maltbie, who used every means known to pare down the amount of working capital, was compelled to admit that a small company, such as the complainant, requires a larger working capital per thousand cubic feet than the Consolidated Gas Company (Record, page 1267). The Special Master in the Consolidated case allowed 20 cents per thousand cubic feet of annual sales. Colonel Miller's figure in this case amounts to 50 cents per thousand.

The methods by which the witness Maltbie arrives at his ridiculously low figure for working capital, in so far as those methods are comprehensible at all, are disclosed by him in his cross-examination. It is apparent from the reading of that cross-examination that he failed to take into account the very important element of gas furnished to consumers but not yet billed, an element which all witnesses agree exists in the case of all gas companies. His method is further faulty in that it fails to take account of accounts receivable, the witness claiming that they should be balanced by accounts payable, a fallacious doctrine leading to the most absurd conclusions.

Moreover, the witness did not adhere to the figures which he pretended to have used both for materials and supplies and for cash, making them vary without apparent reason from the actual book figures furnished him, and making use of a so-called "rounding off" process to arrive at a figure satisfactory to himself. For example, in making the computation for 1906, the witness used the figure of $10,000 for materials and supplies, when the defendants' own exhibit A10 showed an amount of over $23,000 (Record, page 1761). For the year 1919 the witness reported $25,000 for materials and supplies, whereas complainant's record showed $60,000. The witness used $15,000 for cash where the complainant's record showed $50,000 (Record, page 1272). Instances might be multiplied from the cross-examination of this witness showing the arbitrary and unreasonable paring down to which he resorted in order to reduce the amount of working capital of the complainant company.

Moreover this very witness Maltbie, while a member of the Public Service Commission for the First District, allowed as working capital, in decisions filed by him, sums far in excess of the amounts allowed in this case. The details of these decisions and the allowances made by him for the working capital of gas companies in this territory, will also be found in his cross examination in the present record. See, also, discussion of working capital, under Point XI of the Appellee's Brief on the Facts, in *Consolidated Gas Company* v. *Newton* (Case No. 257), argued contemporaneously herewith. The witness' attitude upon the witness stand in attempting to support his ridiculously low estimate was obviously not tempered by the same sense of fairness and freedom from bias,

which may be assumed to have actuated him while he was a member of the Public Service Commission.

It must further be remembered in considering this subject of working capital, that the conditions reflected at the end of the year 1919 were very different from those of earlier years in this century, with respect to the quantity of cash or the quantity of materials and supplies which the company must have on hand. As to materials, conditions are adverse, especially as to the principal items of coal and oil. The price of each of these has more than doubled so that a given amount of money allowed for the items of coal and oil on hand represents only half as much material as in former years. The same is true of cash on hand of which a far greater quantity must be kept available in order to perform the same amount of useful service as formerly. Furthermore this company has been suffering for years from this inadequate and confiscatory rate and the lack of necessary funds with which to operate, and indeed has had to borrow money, not only for the payment of its bond interest but for the payment of its current operating expenses. It has been continuously upon an inadequate cash basis. The figures in the company's balance sheet showing cash on hand, therefore, cannot be taken as a proper indication of an adequate amount for the economical conduct of its business.

It is submitted that Colonel Miller's estimate of $165,000 is under all the circumstances a very fair and conservative estimate, and that under no conceivable possibility could the court have confirmed any figure lower than the extremely low figure arrived at by the Master as allowable for this item.

IX.

The claim that the cost of the Douglaston Extension should not be included in the "rate base" is without merit.

The contention is made by the appellants that the investment which the State Commission required this appellee to make in extending its mains to the remote community of Douglaston should not have been included by the Master in the sum found by him as the value of the appellee's property.

The history of that litigation will be found stated at length in *New York and Queens Gas Company* v. *McCall*, 245 U. S. 345, where this Court affirmed the order of the State authorities requiring this extension.

The validity and propriety of this Order of the Commission was fairly open to controversy. It was set aside, in first instance, by the Appellate Division of the State Supreme Court (171 App. Div. 580), reinstated by the Court of Appeals, and finally affirmed by this Court, which has recently, in the *Ben Avon Borough* case (253 U. S. 287, 295) left some doubt whether it still adheres to its ruling in *New York and Queens Gas Company* v. *McCall*. Surely this appellee was within its rights in seeking a judicial review of a Commission Order of such doubtful validity. In particular it is not blameable for failure to comply with an Order of the State Commission during the time that Order had been annulled by the State Court.

After the decision of this Court the great War brought the necessity of the conservation of labor

and materials. In accordance with the recommendation of the Federal authorities charged with seeing to it that construction not absolutely essential was deferred during the War, the defendant Public Service Commission granted the company additional time within which to comply with the Order of the Commission (Order in Case No. 1856; Record, page 1597). Before the trial of this case, however, the work had been completed, at an expense of $145,735.71 (record, page 745), and the investment now constitutes a part of the property used by the company in its business.

The fact that this extension was not completed until the latter part of the year 1919 does not prevent its being a part of the property used and useful when the case was tried and decided, in 1919 and 1920.

It is difficult to see why the company should be denied any return upon it, especially in view of the large investment the company was required to make in it, and the complete lack of any substantial earnings therefrom. Gas is supplied to this section only through high pressure mains, and actually costs several dollars per thousand cubic feet sold in that territory.

In our view of the case the inclusion or omission of this investment in the rate base could not affect the result, but there was no error in its inclusion, and the claims of the appellants have neither merit nor sincerity.

X.

The Special Master and the District Court were correct in refusing to make any deductions for so-called "depreciation", from the appellee's actual investment in gas property.

Under Point XV, p. 369 *et seq.* of the Appellee's Brief on the Facts, in *Consolidated Gas Company v. Norton* (Docket No. 257), we have dealt fully with the subject of "depreciation", and have, we think, demonstrated the soundness of the numerous rulings of State and Federal Courts, in these and other cases, which have refused to make deduction for "accrued theoretical depreciation".

Without developing anew herein the argument or citations of authority, we beg to refer to that brief. That case and the case at bar present similar records, so far as concerns the testimony on this particular subject.

The Special Master, in his Opinion in the present case, summarized the testimony and discussed the subject with great clarity (Record, page 57 *et seq.*).

Upon the present trial it was developed very clearly from the defendants' witnesses that the adoption of their theories would add at least three cents per thousand to the required rate per thousand cubic feet (see Testimony of Hine; Record, page 1885 *et seq.*).

The cross-examination of the defendants' witness in this case will be found a complete revelation of the anomalies and absurdities of the "accrued de-

preciation" theory and the methods of conjecture, speculation, and utter error, on which it is based.

The Special Master found as a fact, from uncontradicted testimony, that (Finding No. 32):

> "The plant, machinery and equipment used in the gas business of the complainant company have been and are maintained in excellent operating condition; proper repairs, renewals and replacements have been made as and when needed, and the same are now in as high a state of efficiency as if new."

The uncontradicted testimony of Colonel Miller (Record, page 656), confirmed as to the condition and efficiency of the property by the only "engineer" placed on the stand by the defendants (Mr. Hine) (Record, page 1181), was that an expenditure of $6,144.07 for repairs, renewals and replacements would put the plant, structures, machinery and equipment in a condition substantially as good as when they were erected or installed. Colonel Miller's tabulation, printed in the record at page 658 *et seq.*, gives the detailed estimates for such work in full. Concerning this the Master said (Opinion, page 60):

> "This sum, however, does not, in my opinion, measure any impairment in the present value of the property used and useful in the gas business. It represents merely an unmatured obligation to *maintain* the property in efficient operating condition *out of future earnings*, the expert witnesses of both the complainant and the defendants agree *that it was and is maintained in efficient and first class condition*. I, therefore, have not deducted this or any other sum representing so-called accrued depreciation from the amount found by me to represent the investment of the complainant in its gas property upon which it is entitled to have its rate such as to yield a reasonable return."

XI.

The final decree entered by the District Court should be affirmed, with costs.

November 14, 1921.

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Solicitors for the Appellee.

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WILLIAM L. RANSOM,
CHARLES A. VILAS,
JACOB H. GOETZ,
of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1921.

No. 296.

CHARLES D. NEWTON, AS ATTORNEY-GENERAL OF THE STATE OF NEW YORK, AND ALFRED M. BARRETT, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK FOR THE FIRST DISTRICT,

Appellants,

against

NEW YORK AND QUEENS GAS COMPANY,

Appellee.

SUBJECT-INDEX OF APPELLEE'S BRIEFS, WITH CROSS-REFERENCES TO APPELLANTS' POINTS.

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CROSS-REFERENCES TO POINTS OF BRIEF OF CORPORATION COUNSEL OF THE CITY OF NEW YORK FOR DANA WALLACE AS DISTRICT ATTORNEY OF QUEENS COUNTY*

Points of Appellant's Brief		Reply Page Appellee's Brief
I.	**The Sufficiency of the Proofs of Manufacturing Cost.**	
	REPLIED TO: Appellee's Brief; Point I; pages	12–57
	See, also Appellee's Brief; Point IV; pages	67–71
	See, also, Appellee's Brief on the Facts in *Consolidated Gas Company v. Newton* (No 257); Points II and IV.	
II.	**The Earnings of the Appellee Prior to the End of the Year 1917.**	
	That the Earnings in These Prior Years Were Immaterial to the Question Before the Court, see Appellee's Brief; Point III; pages	64–66

*For the convenience of the Court, we have indicated, in connection with each of the Points contained in the respective briefs of the Appellants, the pages of the Appellee's Brief at which such Point of the Appellants is replied to. The Appellee's Brief in this case was prepared and filed for its argument as originally assigned, contemporaneously with the argument in *Consolidated Gas Company v. Newton, et al.* (Docket No. 257), heard in this Court on November 18, 1921, involving substantially the same parties defendant, in which the same counsel appeared for the respective sides of the litigation. For that reason, contentions by the appellants which are common to both cases were dealt with primarily in the briefs in behalf of the *Consolidated Gas Company* in No. 257 and suitable references to those briefs were made in the Appellee's Brief in the instant case and are incorporated in these indices. At certain points in these indices, cross-references have also been made directly to the Exhibits and testimony in the present case. We have also, on page 8, *post*, set forth a Subject-Index of the Appellee's Brief.

Points of Appellant's Brief		Reply Page Appellee's Brief
	See, also, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton;* Point I, pages 24-27; Point VIII, pages 267-271; Point IX, pages 272-288.	
	IV. The "Fair Value" of the Appellee's Property—The Appellee's Investment Therein.	
	REPLIED TO: Appellee's Brief; Points VIII and IX; pages	83–100
	The District Court Did Not Find $1,130,497.08 to Be the Proper "Rate Base" of the Appellee for the Year 1919, as Stated on Page 9 of Appellant Newton's Brief; See Record, Pages 118 and 115, and Appellee's Brief, Pages.....	8–11
	See, also, Appellee's Brief; pages.....	8–11
	See, also, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton;* Point XIII; pages 344-353.	
	V. The Alleged Erroneous Refusal of the Master and District Court to Deduct "Accrued Theoretical Depreciation."	
	REPLIED TO: Appellee's Brief; Point X; pages	101–102
	See, Principally, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton;* Point XV, pages 369-460; Point XVI, pages 461-470.	
	See, as to the Fund for "Contingencies," Appellee's Brief; Point II; pages....	58–63

Points of Appellant's Brief — Reply Page Appellee's Brief

VI. The Conduct of the Trial Before the Special Master.

REPLIED TO: Appellee's Brief; pages.. 8-18

See, also, Appellee's General Brief in *Consolidated Gas Co. v. Newton;* Point IV; pages 14-24

See, also, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton;* Point I, pages 17-29; Point II, pages 31-144; Point IV, pages 155-219.

VII. The Admissibility in Evidence of the Books of Account.

REPLIED TO: Appellee's Brief; Point IV; pages 67-71

See, also, for comprehensive reply, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton;* Point IV; pages 155-219.

See, also, for a detailed discussion showing the compliance of these books with the Uniform System of Accounts prescribed by the Public Service Commission, *ibid.*, Point V, pages 220-238.

See, also, Appellee's Brief; pages.....8-56

CROSS-REFERENCES TO POINTS OF BRIEF OF APPELLANT NEWTON AS ATTORNEY-GENERAL*

Points of Appellant's Brief — Reply Page Appellee's Brief

I. The Earnings of the Appellee Prior to the End of the Year 1917.

See above as to Point II of Brief of Corporation counsel.

II. The Sufficiency of the Test Period Used In This Case by the Master and District Court (1918, 1919, and Five Months of 1920).

See above as to Point III of Brief of Corporation Counsel.

III. The Claim of a Fund for "Contingencies."

REPLIED TO: Appellee's Brief; Point II; pages 58–63

*For the convenience of the Court, we have indicated, in connection with each of the Points contained in the respective briefs of the Appellants, the pages of the Appellee's Brief at which such Point of the Appellants is replied to. The Appellee's Brief in this case was prepared and filed for its argument as originally assigned, contemporaneously with the argument in *Consolidated Gas Company v. Newton, et al.* (Docket No. 257), heard in this Court on November 18, 1921, involving substantially the same parties defendant, in which the same counsel appeared for the respective parties to the litigation. For that reason, contentions by the appellants which are common to both cases were dealt with primarily in the briefs in behalf of the *Consolidated Gas Company* in No. 257 and suitable references to those briefs were made in the Appellee's Brief in the instant case and are incorporated in these indices. At certain points in these indices, cross-references have also been made directly to the Exhibits and testimony in the present case. We have also on page 8, *post*, set forth a Subject-Index of the Appellee's Brief.

Points of Appellant's Brief		Reply Page Appellee's Brief
	Not a "Fund" as Claimed by the Appellants	58–59
	See, also, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton*; pages 271, 461–470.	

IV. The Earnings of the Appellee in 1918, 1919, and During Five Months of 1920.

	Replied To: Appellee's Brief; Point I; pages	12–57
	See, also, Appellee's Brief; pages	10–11

V. The Refusal to Deduct "Accrued Theoretical Depreciation."

See above as to Point V of Brief of Corporation Counsel.

VI. The Working Capital Required for the Appellee's Gas Business and the Undistributed Structural Costs as Elements in Valuation.

	See, as to working capital, Appellee's Brief; pages	94–98
	See, also, as to working capital, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton*; Point XI; pages 305-316.	
	See, as to undistributed structural costs, Appellee's Brief, pages	86, 88–91

Points of Appellant's Brief

Reply Page Appellee's Brief

VII. The "Fair Value" of the Appellee's Property—The Appellee's Investment Therein.

See above as to Point IV of Brief of Corporation Counsel.

VIII. The Conduct of the Trial Before the Special Master.

See above as to Point VI of Brief of Corporation Counsel.

IX. The Rate of Return.

REPLIED TO: Appellee's Brief; Point VII; page 82

See, principally, Appellee's General Brief in *Consolidated Gas Co. v. Newton;* Point VI; pages 27-31.

See, also, Appellee's Brief on the Facts in *Consolidated Gas Co. v. Newton*, page 277.

SUBJECT INDEX OF THE BRIEF FOR THE APPELLEE.

Pages

EXHIBIT 47: Tinted map showing real property owned and used by the complainant (Record, p. 1480; Orig. p. 2389).

EXHIBIT 48: A series of 17 photographs showing the buildings, holders, etc., of the complainant's plant (Record, p. 1480; Orig. p. 2390).

EXHIBIT 58: Sheets showing the rates of pay per hour in all departments of the company, from 1911 to 1920 (Record, p. 1567; Orig. p. 2489).

EXHIBIT 59: Statement showing the unit prices paid for generator and boiler coal and for gas oil, from 1911 to 1920 (Record, p. 1567; Orig. p. 2491).

EXHIBITS 60, 61 AND 62: Comparative statements showing the unit prices paid for materials other than coal and oil, from 1914 to 1920 (Record, pp. 1567, 1568; Orig. pp. 2492-2494).

EXHIBIT 64: Detailed statement of the unit costs of the production and distribution of gas during 1919, prepared by Mr. Teele, a certified public accountant of high standing and wide experience (Record, p. 1569; Orig. p. 2496).

EXHIBIT 65: Detailed statement of the revenues and expenses of the complainant's gas business during 1919; also prepared by Mr. Teele (Record, p. 1573; Orig. p. 2500).

EXHIBIT 66 FOR IDENTIFICATION: Detailed inventory and appraisal of all the complainant's property; received as Colo-